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No. 10-809

Supreme Court, U.S.
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In the Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

1. In a federal habeas corpus proceeding, does 28 U.S.C. § 2254(d) deference apply to a state court's rejection of a federal constitutional claim on direct appeal that cites the section of the petitioner's brief raising the claim, and then discusses and applies a state case where the court rejected the same federal constitutional claim?

2. Is there clearly established Supreme Court law extending a criminal defendant's Sixth Amendment right of confrontation to defense discovery, notwithstanding *Pennsylvania* v *Ritchie*, 480 U.S. 39 (1987)?

3. Assuming arguendo an implied restriction on cross-examination in this case, is there clearly established Supreme Court law holding that a criminal defendant's Sixth Amendment right to confrontation unconditionally trumps another criminal defendant's attorney-client privilege?

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STATEMENT OF THE CASE

In 1983, four men, including petitioner and Dino Dinardo, robbed the Horseshoe Bar in Long Beach, California. During the robbery, petitioner shot and killed Robert Nantais, a bar patron. Petitioner also threatened to shoot and kill bartender Dyanne Spence. Another robber ordered James Hall to retrieve a bill from the floor and stabbed him several times. Dinardo removed cash from the cash drawer. The men fled the bar. The robbery remained unsolved for approximately eleven years.

In 1994, a fingerprint expert at the Long Beach Police Department compared fingerprints taken from the cash register at the Horseshoe Bar with fingerprints in a central database. Dinardo's fingerprints were identified as the ones taken from the cash register. In June 1994, Dinardo was arrested in Berkeley, California. He admitted his involvement in the robbery and identified petitioner as one of his accomplices.

Petitioner was charged with murder in violation of California Penal Code section 187(a) and attempted premeditated murder in violation of California Penal Code sections 187(a) and 664. Petitioner was also charged with the special circumstance that the murder occurred during the commission of a robbery within the meaning of California Penal Code section 190.2(a)(17).

Before opening statements, the prosecutor informed the trial court and counsel that during an interview with Dinardo, she learned Dinardo had written a letter "at the request and assistance of [petitioner]" and that the letter "in sum and substance stated that [] Dinardo was coerced by the police into implicating [petitioner] in this crime." The prosecutor had not read the letter and did not

have a copy. She also stated that the information pertained to possible impeachment (See Cert. Pet., App. 79; Supp. App. at 1-2.) Petitioner's counsel did not respond to the prosecutor's statements regarding the letter. (Supp. App. at 2.)

Dinardo testified for the prosecution. During a sidebar conference about discovery before Dinardo was called to testify, the prosecutor stated she did not know whether petitioner's counsel ever received a copy of Dinardo's letter, but if he had, she asserted the prosecution would also be entitled to see it. Petitioner's counsel stated, however, that he did not have a copy. (Supp. App. at 3.) There was no further discussion about the letter at that time. (Supp. App. at 3.)

Just before Dinardo's direct examination, petitioner's trial counsel requested a copy of the letter and asked the court to order Dinardo's attorney, Jack A. Fuller, to produce the letter because he believed it contained an inconsistent statement. (Supp. App. at 4; see Cert. Pet.; App. 79-80.) Mr. Fuller did not have the letter in court but stated that, as he had already advised petitioner's trial counsel, Stephen Peacock, given "[t]he conditions under which it was produced" he did "not believe" the letter was a "*truthful restatement of what occurred.*" (Supp. App. at 4, emphasis added.) Mr. Fuller also asserted a claim of work product. (Cert. Pet., App. 80.) The trial court ordered Mr. Fuller to turn the letter over to the court so it could review the letter to determine whether any portion of it could be disclosed. (Cert. Pet., App. at 80; Supp. App. at 5.)

The prosecution proceeded with Dinardo's direct examination. Before cross-examination, petitioner's attorney asked the court to rule on whether the letter would be disclosed so that he would know what he could ask during cross-

examination. Dinardo's attorney asserted that the letter was protected by the attorney-client privilege and requested that the court refrain from ordering that it be produced to anyone. The court took the issue under submission and petitioner's trial counsel began Dinardo's cross-examination. (Supp. App. at 6-8.) During a recess, the trial court ruled that the letter was protected by the attorney-client privilege. The court further found that no exception to the attorney-client privilege applied. The court did not prohibit or restrict trial counsel from asking Dinardo any questions during cross-examination. The court returned the letter to Mr. Fuller and ordered him to retain the letter in case it was needed in any further proceedings. (Cert. Pet., App. 80; Supp. App. at 30.)

Dinardo's cross-examination continued. Petitioner's trial attorney did not attempt to cross-examine Dinardo about the statements in the letter. Nor did he ask Dinardo any questions about what Dinardo told the prosecutor about the letter. (Supp. App. at 8-29, 32-66.) But trial counsel thoroughly cross-examined Dinardo by impeaching him with questions regarding his motivation for testifying in this case and his credibility generally. (*Id.*) The first question that counsel asked Dinardo was whether he had been convicted of first degree murder based on the same charges that petitioner was facing. Dinardo admitted he had. (Supp. App. at 8.) Counsel elicited that in exchange for Dinardo's testimony his conviction would be reduced from first-degree murder to manslaughter. Dinardo also admitted that his sentence was being reduced from 25 years to life to 12 years and that, with time served, he expected to be released in just five years. Counsel further elicited that Dinardo would have "pretty much" spent the rest of his life in prison had he not testified against petitioner. (Supp. App. at 10.)

Counsel asked Dinardo, "Your purpose for being here today and testifying that Mr. Murdock [*sic.*] was one of the people in the bar is so you can get out of prison early; isn't that right." (Supp. App. at 16.) Dinardo replied, "Yes." (*Id.*) Counsel also elicited testimony from Dinardo that he had initially repeatedly denied his involvement in the robbery to the police. (Supp. App. at 17-19.) Counsel also impeached Dinardo with his prior convictions.

The jury convicted petitioner of first-degree murder and attempted premeditated murder. Petitioner was sentenced to state prison for life without parole.

Petitioner appealed his state convictions to the California Court of Appeal. Petitioner claimed, *inter alia*, that his Sixth Amendment right to confront Dinardo was violated because he was denied access to Dinardo's letter, which could have been used to cross-examine him. Petitioner argued that his right to cross-examine Dinardo took precedence over Dinardo's attorney-client privilege. (Supp. App at 69-89.) In a companion petition for writ of habeas corpus, petitioner reasserted the same claim. (Supp. App. at 90-94.) The California Court of Appeal rejected petitioner's claim finding that "only the most extraordinary circumstance would justify disclosure of the privileged communication between lawyer and client," and that such circumstances did not exist in petitioner's case. (Cert. Pet., App. at 123.) The state appellate court also denied the habeas petition that raised the same claim. The state appellate court affirmed the judgment, but struck the attempted-murder conviction as barred by the statute of limitations. (Cert. Pet., App. at 80-81.) On July 8, 1998, the California Supreme Court denied review. (Cert. Pet., App. at 116.)

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. As relevant here, petitioner claimed that his Fifth and Sixth Amendment rights were violated by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege. (Cert. Pet., App. at 71.)

The district court denied the petition. The Court of Appeals for the Ninth Circuit granted a certificate of appealability on one issue: "Whether appellant's federal constitutional rights were violated when the trial court ruled that prosecution witness Dinardo's letter was protected by attorney-client privilege." Later, a Ninth Circuit panel ruled as follows:

> We now vacate the district court's denial of Murdoch's § 2254 petition, and remand this case to the district court. We instruct the district court to use its process to obtain the letter. Once the letter is obtained, the district court shall then determine in camera and as the court deems appropriate whether, as applied to the totality of facts in this case, the denial of access to Dinardo's letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses.

Murdoch v. *Castro*, 365 F.3d 699, 706 (9th Cir. 2004) (*Murdoch I*).

On remand, a magistrate judge reviewed the letter *in camera*. The magistrate judge issued a report recommending denial of the petition, which was adopted by the district court. In the report, the court found that the California Court of Appeal's decision was contrary to, or involved an unreasonable application of clearly established Federal law, because the state appellate court did not consider

whether petitioner's "right of confrontation trumped Dinardo's right of non-disclosure of privileged communications[.]" (Cert. Pet., App. at 86.) The court nevertheless rejected petitioner's claim under a de novo standard of review. The court summarized the contents of the letter as making the following four factual assertions: (1) the police coerced Dinardo to (2) inculpate petitioner, (3) Dinardo did not know petitioner; and (4) Dinardo and petitioner did not commit any crime. (Cert. Pet., App. at 90.) The court found that trial testimony rebutted the first three statements and half of the fourth statement. Specifically, the court found that the statement Dinardo did not know petitioner was false in light of testimony from petitioner's brother and his former roommate that petitioner and Dinardo were friends. The court also observed that at least half of the fourth statement (that Dinardo and petitioner had not committed any crime) was demonstrably false given that Dinardo's fingerprint was found on or near the bar cash register. The court specified that "Dinardo's denial of involvement in the crime was thus patently false." The court concluded that the intrinsic and probative value of the letter was "low" such that petitioner's right to effective cross-examination was not substantially diminished by exclusion of the letter. The district court, thus, denied the petition. (See Cert. Pet., App. at 95.)

The Ninth Circuit again granted petitioner's request for a certificate of appealability as to one issue: "Whether the district court erred by ruling that the state trial court did not violate appellant's Sixth Amendment right to confrontation when it denied him access to Dinardo's letter." The Ninth Circuit panel held that petitioner's constitutional right of confrontation did not require disclosure of the Dinardo letter in light of its low probative value

and the otherwise effective cross-examination of Dinardo. *Murdoch* v. *Castro*, 489 F.3d 1063, 1069-70 (9th Cir. 2007) (*Murdoch II*). Accordingly, the panel affirmed the district court's denial of Murdoch's petition. *Id.* at 1070.

The Ninth Circuit ordered that the case be reheard en banc. In a 5-1-5 decision, the en banc panel affirmed the denial of habeas relief and the judgment of the district court. The five-judge plurality of the en banc court found:

> Because the Supreme Court has not clearly established whether and in what circumstances the attorney-client privilege must give way in order to protect a defendant's Sixth Amendment confrontation rights, the California state court could not have unreasonably applied clearly established Supreme Court law when it denied Murdoch access to the letter.

Murdoch v. *Castro*, 609 F.3d 983, 996 (9th Cir. 2010) (en banc) (hereinafter *Murdoch III*). One judge concurred in the decision, finding that the state court never had the opportunity to determine whether Dinardo's testimony should be stricken because petitioner failed to request that it be stricken. Therefore, the concurring judge explained, the state court could not have violated petitioner's confrontation rights. *Murdoch III*, 609 F.3d at 996 (Silverman, J., concurring).

REASONS FOR DENYING CERTIORARI

I.

BECAUSE THE CALIFORNIA COURT OF APPEAL ADJUDICATED PETITIONER'S CONFRONTATION CLAIM ON THE MERITS, THE ALLEGED CIRCUIT SPLIT ON WHETHER AN UNADJUDICATED CLAIM DESERVES DEFERENCE IS NOT PRESENTED HERE

In the first question presented in the petition, petitioner asserts that the Ninth Circuit erroneously reviewed petitioner's confrontation claim under the deferential standard of review prescribed by 28 U.S.C. § 2254(d) even though the California Court of Appeal had "overlooked" that claim. By applying § 2254(d), petitioner argues, the Ninth Circuit created a split of Circuit authority on the question whether the statutory deference standard applies to such an "overlooked" claim.

Petitioner's argument, however, is based on a false premise. Contrary to petitioner's assertion, the Ninth Circuit correctly concluded that the California Court of Appeal had in fact adjudicated petitioner's claim on the merits and had not overlooked it.

In his opening brief on direct appeal, petitioner asserted various claims under state law regarding the letter from Dinardo to his attorney. He asserted that the letter was not protected by the attorney-client privilege, that the privilege had been waived, and that the letter was admissible under state law. He also argued that, even if the letter were privileged, his right to cross-examine Dinardo took precedence over the attorney-client privilege. (Supp. App. at 80-89.) The California Court of Appeal expressly addressed in detail each of petitioner's

various claims regarding the attorney-client privilege, cited the relevant portion of the opening brief raising the confrontation aspect of that claim, and applied a state precedent that discussed how to balance the competing interests between the Confrontation Clause and the attorney-client privilege. As part of that analysis, the appellate court addressed whether "petitioner's need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was 'directly exculpatory'" (Cert. Pet., App. at 117-23.) In doing so, the court relied upon *People* v. *Godlewski*, 17 Cal. App. 4th 940, 21 Cal. Rptr. 2d 796 (1993), a state court opinion that had examined a federal circuit court opinion addressing a claim identical to petitioner's and another precedent addressing a similar claim. *Id.* at 947-49.

In *Godlewski*, the defendant claimed he was entitled to use statements, overheard by another inmate, that his co-defendant had made to his lawyer. The defendant "relie[d] upon cases which have adopted a balancing approach to decide whether or not the *attorney-client privilege* should yield to the accused's *right to confront and cross-examine*." *Id.* at 947, emphasis added. *Godlewski* discussed and applied the reasoning of two cases, one from the federal courts of appeal, addressing the balance between the attorney-client privilege and a criminal defendant's federal constitutional rights, and another which directly addressed the right to cross-examine. *Id.* at 947-48.

In *United States ex rel. Blackwell* v. *Franzen*, 688 F.2d 496 (7th Cir. 1982), the *Godlewski* court observed, the Seventh Circuit reversed the district court's finding "that the limitation placed on the defense cross-examination of the accomplice violated the constitutional right to cross-examine."

Godlewski, 17 Cal. App. 4th at 947, see *Blackwell*, 688 F.2d at 500. In addition, *Godlewski* noted the Seventh Circuit's conclusion that "the invocation of the attorney-client privilege had not prejudiced the defendant's right to cross-examine the state's principal witness" in light of the "wide latitude" defense counsel had been given to "explore the issue of the accomplice's credibility[ ]" *Godlewski*, 17 Cal. App 4th at 947, see *Blackwell*, 688 F.2d at 501.

Godlewski also relied on a decision from the Court of Appeals for the District of Columbia, *Neku* v. *United States*, 620 A.2d 259 (D C. 1993), which the state court cited for the proposition that "[i]n the criminal context the [attorney-client] privilege acquires Sixth Amendment protection." *Godlewski*, 17 Cal App. 4th at 746 The *Godlewski* court explained that, in *Neku*, the defendant sought to call his former co-defendant's "former attorney to testify to prior inconsistent statements [the former co-defendant] had made to counsel which would allegedly impeach [the former co-defendant's] inculpatory trial testimony." *Godlewski*, 17 Cal. App 4th at 748 *Godlewski* noted that the Court of Appeals for the District of Columbia, relying on *Blackwell*, had upheld the trial court's finding that the statements were privileged and concluded that "the probative value of the proffered impeachment was inadequate to outweigh the interests protected by the attorney-client privilege, given the other methods available to impeach [the former co-defendant]." *Id* at 948.

The *Godlewski* court concluded that neither *Blackwell* nor *Neku* held "that the defendant has a per se right to breach the attorney-chent privilege in order to present a defense. The most that can be distilled from the two cases is that a criminal defendant *may*, under certain circumstances, have

the right to use privileged communications" *Godlewski*, 17 Cal. App. 4th at 948, italics in original. As pertinent here, the court then concluded: "To make that determination, a court must employ a balancing process to decide if a breach of the privilege is necessary to implement *the accused's constitutional rights.*" *Id.*, emphasis added.

In petitioner's state appeal, the California appellate court manifested its rejection of petitioner's confrontation/attorney-client privilege claim by relying on *Godlewski*, as follows.

> Finally, Murdoch claims that even if the letter fell within the attorney-client privilege, and if the privilege was not subsequently waived, his need to discover the contents of the letter outweighed Dinardo's interest in confidentiality because the letter was "directly exculpatory. . . .["] In his habeas petition, Murdoch asserts the letter did even more because it "substantively exculpates petitioner." We are not persuaded. "[I]t is patent that the attorney-client privilege is not one to be easily discarded merely because a defendant asserts that invocation of the privilege results in the denial of his right to a fair trial (*People v. Godlewski* (1993) 17 Cal.App.4th 940, 947.) "[W]e conclude that only the most extraordinary circumstance would justify disclosure of privileged communications between lawyer and client . . . ." (*Id.*, at p. 945.) We find no such extraordinary circumstances here.

(Cert. Pet., App. at 123.)

As the Ninth Circuit noted, although the California appellate court did not expressly refer to the Confrontation Clause, see *Murdoch III*, 609 F.3d at 991 n.6, it nonetheless addressed petitioner's constitutional claim. As the Ninth Circuit explained:

> The California Court of Appeal, which rendered the last reasoned state decision in this case, addressed Murdoch's Confrontation Clause argument only obliquely. It did not mention the Confrontation Clause in its opinion, but it did discuss and quote from the section of Murdoch's brief in which he raised the issue. The court also quoted from *People v. Godlewski*, 17 Cal.App.4th 940, 21 Cal.Rptr.2d 796, 800 (1993), a case that dealt with the tension between the attorney-client privilege and the Confrontation Clause.

Id. Thus, the Ninth Circuit correctly found that the California appellate court adjudicated petitioner's confrontation/attorney-client privilege claim on the merits. The California appellate court relied on *Godlewski*, which specifically dealt with the confrontation/attorney-client privilege issue.

Contrary to petitioner's argument, the state court did not address the state law issues only. The state court cited the section of the opinion that dealt with that federal issue. (Cert. Pet., App. at 123, citing *Godlewski*, 17 Cal. App. 4th at 940, 945, 947.) Indeed, the court's citation to *Godlewski* only makes sense as it relates to petitioner's confrontation claim. In addition, the court referred to and quoted the section of petitioner's brief raising the confrontation/attorney-client privilege claim. These facts demonstrate the court did not "overlook[]" the confrontation claim. On the contrary, they establish

that the court considered and denied petitioner's claim that his right to cross-examine Dinardo outweighed Dinardo's attorney-client privilege.

Moreover, petitioner reasserted the same confrontation/attorney-client privilege claim in a separate habeas petition that the California appellate court also denied on the merits in its opinion. (Cert. Pet., App. at 98, 134.) So the state court not only denied petitioner's federal confrontation claim in the appeal, but also adjudicated the merits of the claim when it denied the corresponding habeas petition. See *Harrington* v. *Richter*, 131 S Ct. 770, 784 (2011).

As a result, the Ninth Circuit correctly held:

> Here, AEDPA applies because the state court denied Murdoch's claim "on the merits," rather than on a procedural or other ground. 28 U.S.C. § 2254(d)(1); *see Lambert v. Blodgett*, 393 F 3d 943, 969 (9th Cir 2004); *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (assuming, unless it is otherwise "clear," that a state court has decided all the issues presented); *Hunter v. Aispuro*, 982 F.2d 344, 346-48 (9th Cir 1992) (presuming denial of habeas relief is on the merits, not procedural grounds, unless the decision supports the opposite conclusion).

Murdoch III, 609 F.3d at 989

As the foregoing quotation makes clear, the Ninth Circuit concluded that the California appellate court had adjudicated petitioner's claim on the merits. The Ninth Circuit did not, as petitioner asserts, "[find] it irrelevant whether the California courts overlooked Murdoch's arguments." (Cert Pet at 12.) Nor did the California appellate court

overlook what petitioner implies was the last claim on appeal. (Cert. Pet. at 11-12 ("This Confrontation claim was Murdoch's eleventh enumerated argument, but the Court of Appeal addressed *only* the first ten arguments") (emphasis added).) Rather, petitioner raised twenty-two enumerated arguments in his opening brief, and the state court proceeded to address the remaining arguments in its opinion. (Cert. Pet., App. at 123-33.)

Given that the state court did not "overlook[]" petitioner's claim but instead considered and denied it, the fact that the court did not expressly cite the Confrontation Clause in its opinion is irrelevant. As the Ninth Circuit explained:

> Whether the state court adequately responded to Murdoch's Confrontation Clause argument, however, is irrelevant. Even when there is no reasoned state court opinion explaining the denial of a defendant's claim in any respect, we "must assume that the state court has decided all the issues and 'perform an independent review of the record to ascertain whether the state court decision was objectively reasonable.'" *Reynoso* [v. *Giurbino*], 462 F.3d [1099,] 1109 [9th Cir. 2006] (quoting *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted). Thus we do not review Murdoch's claim de novo, as we would if the state court had clearly indicated that it had not reached the merits of Murdoch's claim. *See id.*; *Pirtle* [v. *Morgan*], 313 F.3d [1160,] 1167 [9th Cir. 2002].

Murdoch III, 609 F 3d at 991 n.6.

As this Court recently explained in another context,

> By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). *There is no text in the statute requiring a statement of reasons.* The statute refers only to a "decision," which resulted from an "adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. [Citations omitted.] And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8 (2002) *(per curiam)*. Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief

Richter, 131 S. Ct. at 784 (italics added).

Contrary to petitioner's assertion, the Ninth Circuit plurality did not hold that an overlooked claim warrants deference under § 2254(d). Rather, the court held that the California Court of Appeal had in fact adjudicated the claim on the merits. As a result, the claim was plainly entitled to deference under Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). It follows that petitioner's assertion, that the Ninth Circuit erroneously applied § 2254(d) to an "overlooked" claim so as to create a circuit split is incorrect.

II.

BECAUSE THE CONFRONTATION CLAUSE DOES NOT EXTEND TO DISCOVERY, THE CALIFORNIA COURT OF APPEAL COULD NOT HAVE CONTRADICTED OR UNREASONABLY APPLIED ANY CLEARLY ESTABLISHED AUTHORITY OF THIS COURT

Nor is certiorari warranted on the second question presented in the petition. Petitioner asserts that certiorari should be granted to correct the Ninth Circuit and because petitioner is entitled to habeas relief. However, in making this argument, petitioner does not allege a split among the circuit courts of appeal or identify an issue of national importance. Rather, petitioner simply argues that the Ninth Circuit's decision was incorrect. Certiorari is not warranted on that basis. Moreover, since the trial court did not restrict Dinardo's cross-examination, petitioner's claim is necessarily based on an extension of the Confrontation Clause to discovery, but this Court has expressly held the precise opposite. Further, even assuming that the trial court's discovery ruling could be viewed as an implicit restriction on Dinardo's cross-examination, as the Ninth Circuit recognized, the state court decision did not result in a ruling that was contrary to, or involved an unreasonable application of, this Court's clearly-established Confrontation Clause law. For these reasons, certiorari is not warranted.

A. The Trial Court Did Not Restrict Petitioner's Cross-Examination of Dinardo; Accordingly, The California Court of Appeal's Decision Is Entirely Consistent With This Court's Precedent

In *Pennsylvania* v. *Ritchie*, 480 U.S. 39 (1987), the defendant claimed that he could not effectively cross-examine his daughter, whom he was accused of molesting, because he did not know which types of questions would best expose the weaknesses in her testimony without investigatory material prepared by a state child services agency. 480 U.S. at 51. This Court rejected a broad interpretation of *Davis* v. *Alaska*, 415 U.S. 308 (1974) and found, "The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. [Footnote.]" *Pennsylvania* v. *Ritchie*, 480 U.S. at 52-53. This Court concluded that "the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie's lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, . . . the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause." *Id.* at 54.

Similarly, here, petitioner sought discovery of Dinardo's letter to cross-examine Dinardo about the letter. Since the Confrontation Clause did not extend to the CYS file in *Ritchie*, it does not extend to Dinardo's letter here because the Confrontation Clause does not extend to discovery and does not require the disclosure of records in order to facilitate cross-examination. Accordingly, *Ritchie* compels the

conclusion that the California Court of Appeal's rejection of petitioner's claim did not contradict or involve an unreasonable application of this Court's precedent. On the contrary, it was consistent with *Ritchie*.

In an attempt to avoid the obvious consequences of *Ritchie*, petitioner claims that "[petitioner's] objection involves a 'court imposed restriction on the scope of questioning[.]'" (Cert. Pet. at 22.) However, petitioner does not and cannot point to any such restriction. While the trial court ruled that Dinardo's letter was protected by the attorney-client privilege, petitioner's counsel never attempted to obtain a ruling from the trial court about the permissible scope of cross-examination, including Dinardo's conversation with the prosecutor about the letter. In addition, petitioner's counsel never attempted to ask Dinardo any questions about Dinardo's conversation with the prosecutor about the letter, or about the letter itself, during cross-examination. He did, however, successfully cross-examine Dinardo about his testimony at his own trial that the police coerced his confession, which covered the important aspect of the letter, i.e., that the police coerced Dinardo (Supp. App. at 53.) He could also have specifically asked Dinardo whether the police coerced him into identifying petitioner, an allegation specifically mentioned by the prosecutor before Dinardo's testified (Cert. Pet. at 22), but he simply did not do so. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("'[T]he protection of the [attorney-client] privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing'") (citation omitted).

There was no objection or limitation on cross-examination about whether Dinardo previously claimed his confession and identification of petitioner was coerced by the police. Indeed, as noted, Dinardo testified his confession was coerced at his own trial, and counsel cross-examined him about that testimony. (Supp App. at 53.)

As in *Ritchie*, except for routine evidentiary rulings, "the trial court placed no limitation on the scope of cross-examination." *Ritchie*, 480 U.S. at 45. Accordingly, petitioner's right to confrontation was not even implicated by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege.

Citing the portion of this Court's decision in *Ritchie* addressing the prosecution's duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), petitioner argues that "[t]he Superior Court wrongly prevented [petitioner], once he knew of the letter, from using it to cross-examine Dinardo." (Cert. Pet. at 22.) Petitioner's argument is misplaced. There was no *Brady* claim before the Ninth Circuit, petitioner did not even allege a *Brady* claim in his federal petition in the district court, and he did not exhaust a *Brady* claim in the California Supreme Court. Moreover, the portion of the *Ritchie* decision addressing a related *Brady* issue is irrelevant to the confrontation issue here.

Petitioner's claim necessarily requires an extension of this Court's Confrontation Clause jurisprudence to discovery of records in order to facilitate additional cross-examination. Such an extension is prohibited by *Teague* v. *Lane*, 489 U.S. 288 (1989).

Petitioner's right to cross-examine Dinardo about his allegation that the police coerced him into identifying petitioner and confessing was not even

implicated, let alone restricted or violated, by the trial court's ruling that Dinardo's letter was protected by the attorney-client privilege. Accordingly, *Ritchie* compels the conclusion that the California Court of Appeal's rejection of petitioner's claim did not contradict or involve an unreasonable application of this Court's precedent. On the contrary, it was consistent with *Ritchie*.

Accordingly, certiorari is not warranted on the second question presented.

B. Even If Petitioner's Confrontation Rights Were Implicated, This Court Has Not Squarely Addressed The Relationship Between A Criminal Defendant's Rights To Cross-Examine And The Attorney-Client Privilege; Thus, The State Court Could Not Have Unreasonably Applied This Court's Precedent

Petitioner asserts that habeas relief is warranted under de novo review, but that, even under § 2254(d), the state court contradicted and unreasonably applied this Court's clearly established precedent. (Cert. Pet. at 16-20.) According to petitioner, as of the time of the California appellate court's decision in 1998, this Court had clearly established a rule that "a trial court cannot bar inquiry into relevant subjects of impeachment of an accuser, except to protect . . . the privilege of self-incrimination." (*Id.* at 16.)

However, this Court has not clearly established such a blanket rule. Thus, as demonstrated below, the Ninth Circuit correctly concluded that the California appellate court's decision could not have contravened or unreasonably applied this Court's clearly established precedent.

Petitioner does not argue that this Court has addressed the relationship between the Confrontation Clause and the attorney-client privilege. That state of affairs alone is enough to dispose of petitioner's claim under § 2254(d).

Petitioner instead asserts that this Court's decisions in *Smith* v. *Illinois*, 390 U.S. 129 (1968), and *Davis* v *Alaska*, 415 U.S. 308, somehow represent the clearly established law for purposes of this case. (Cert. Pet. at 17-19.) Yet, neither one of those cases deals with the potential conflict between the Confrontation Clause and attorney-client privilege, and petitioner does not claim otherwise. So they cannot serve as the clearly established law that supports any relief in this case. *Carey* v *Musladin*, 549 U.S. 70, 77 (2006).

In *Smith*, this Court directly reviewed a state criminal case in which the defense was denied an opportunity to ask a witness his real name and address, even though he admitted the name he had provided was false *Smith*, 390 U.S. at 131. This Court found that denying the defendant the opportunity to identify the witness and place the witness "in his proper setting" violated the defendant's confrontation rights. *Id.* at 132-33. This Court observed that the trial court was not obligated to "protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked." *Id.* at 133. But, since there was "no claim of the privilege of compulsory self-incrimination [] asserted" in *Smith*, *id.* at 751 n.8, the Court's language does not clearly establish the rule that applies to petitioner's claim.

Smith did not address a situation in which the right to cross-examination conflicted with any other right or legal privilege. Rather, as Justice White

noted in his concurrence, "the State gave no reasons justifying the refusal to answer a quite usual and proper question." *Smith*, 390 U.S. at 134. Thus, the *Smith* Court did not balance the right to cross-examination against any other constitutional right or legal privilege—let alone the attorney-client privilege in particular. Nor did the Court even announce a more general rule, framework, or test to apply when one constitutional right competes with another constitutional right or legal privilege. Accordingly, *Smith* did not compel the California appellate court to resolve petitioner's claim differently. As a result, the California appellate court could not have contradicted or unreasonably applied *Smith*, as petitioner suggests. (Cert. Pet. at 18-19.)

In *Davis*, this Court addressed the "tension between the right of confrontation and the State's policy" (415 U.S. at 314) of "preserving the confidentiality of juvenile adjudications of delinquency" (*id.* at 309). The Court found that, although "counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318. The Court noted that, given "the limited cross-examination that was permitted," the jury may have believed that defense counsel's questions were speculative or a "baseless line of attack on an innocent witness[.]" *Id.* at 318. The Court held: "*On these facts* it seems clear to us that to make such an inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination[.]" *Id.*,

emphasis added. Later, the Court reiterated: "*In this setting* we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319, emphasis added. The Court also balanced the competing interests between the right of confrontation and the State's policy:

> Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is *outweighed* by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

Id. at 319.

Davis did not hold that the right of confrontation always prevails over all state-created rights or privileges. In certain cases, the protected information could be entirely cumulative or even less useful than other readily-available impeachment material. By specifically concluding that its holding was based on the particular facts at issue and on balancing the right of confrontation with the State's policy, *Davis* left room for the possibility that another right or privilege may in certain circumstances take precedence over a certain line of questioning during cross-examination. Indeed, as Justice Stewart observed in his concurring opinion, "the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions." *Davis*, 415 U.S. at 321.

Davis did not clearly establish that the right of confrontation always trumps other rights or

privileges; it instead employed a balancing test between the right of confrontation and a "State policy." It necessarily follows that *Davis* did not clearly establish the rule suggested by petitioner that the right of confrontation always takes precedent over other rights and privileges, except for the ones enumerated in *Smith* (Cert. Pet. at 17-19.) As a result, the California appellate court could not have contradicted or unreasonably applied such a rule in denying petitioner's claim

The Ninth Circuit correctly found that *Swidler & Berlin* v *United States*, 524 U.S. 399 (1998), supported the conclusion that there was no clearly established Supreme Court law on the issue presented in petitioner's habeas petition. In *Swidler*, this Court addressed "'the extent to which the [attorney-client] privilege survives the death of the client.'" *Murdoch III*, 609 F.3d at 993, quoting *Swidler*, 524 U.S. at 403. The issue in *Swidler* was whether the attorney-client privilege should give way to a criminal investigation after the client's death Although *Swidler* was procedurally and factually different from the case here, the Ninth Circuit found the following statement in *Swidler* "significant[]":

> "Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," but the Court stated that "*[w]e do not need to reach this issue*, since such exceptional circumstances clearly are not presented here."

Murdoch III, 609 F.3d at 994, quoting *Swidler*, 524 U.S. at 408 n.3.

The Ninth Circuit then concluded that *Swidler* itself foreclosed habeas relief in this case:

> *The Supreme Court accordingly has explicitly stated that it was not deciding whether the attorney-client privilege might have to yield to a criminal defendant's constitutional rights.* We have held that a constitutional principle is not clearly established for purposes of § 2254 where the Supreme Court has expressly concluded that an issue is an "open question."

Murdoch III, 609 F 3d at 993-94, emphasis added and citations omitted.

Similarly, the Eighth Circuit Court of Appeals has concluded that this Court has "expressly left open the question of whether a criminal defendant's constitutional rights might overcome the attorney-client privilege." *Newton* v. *Kemna*, 354 F.3d 776, 781 (8th Cir. 2004); see *Murdoch III*, 609 F 3d at 994. The Eighth Circuit reasoned:

> Whether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake, and we are unable to discern any transcendental governing principles that foreshadow what the Supreme Court would do in the case before us Given the restrictive nature of habeas review, it is not our province to speculate as to whether the Supreme Court, if faced with the issue, would find that Missouri's physician-patient privilege must give way to a defendant's desire to use psychiatric records in cross-examination

Newton, 354 F 3d at 782.

As the Ninth Circuit explained, "[t]he attorney-client privilege is, after all, 'one of the oldest recognized privileges for confidential communications,'" *Murdoch III*, 609 F 3d at 995, quoting *Swidler*, 524 U.S at 403 As a result, this Court "might well decide that [the attorney-client] privilege is worthy of greater protection than the marital privilege . . . or the confidentiality of juvenile delinquency proceedings . . . ." *Murdoch III*, 609 F.3d at 995. What matters under § 2254(d) is that at the time of the California appellate court's decision in 1998, it had not done so.

This Court has repeatedly cautioned that, when its cases "give no clear answer to the question presented, let alone one in [petitioner's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008); *Schriro* v *Landrigan*, 550 U.S. 465, 478 (2007); *Carey* v. *Musladin*, 549 U.S. at 77; *Kane* v. *Garcia Espitia*, 546 U S. 9, 10-11 (2005) (per curiam). Since this Court's cases "give no clear answer to the question presented in this case, let alone one in [petitioner's favor], it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law *Musladin*, 549 U.S. at 77, 127 S Ct. 649, 654 (quoting 28 U.S.C § 2254(d)(1))" *Van Patten*, 552 U.S at 126 (internal quotations omitted). "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized" *Id.*

Certiorari is unwarranted because, even assuming the Confrontation Clause is implicated, this AEDPA case involves an issue of first impression, specifically, the relationship between the Confrontation Clause and the attorney-client

privilege. For this additional reason, the petition for writ of certiorari should be denied

C. Even Assuming *Smith* And *Davis* Constitute Clearly Established Federal Law Governing Petitioner's Claim, Relief Is Barred By § 2254(d)

Even assuming that *Smith* and *Davis* constitute clearly established precedents from this Court governing petitioner's claim, § 2254 (d) bars habeas relief. Since the Ninth Circuit concluded that the absence of clearly established law precluded relief under § 2254(d)(1), the court had no occasion to determine whether the California Court of Appeal contradicted or unreasonably applied *Smith* or *Davis* However, even if those cases govern petitioner's claim, habeas relief is unavailable because the state appellate court did not contradict or unreasonably apply those cases in denying petitioner's claim. Indeed, the state court's decision was entirely consistent with those cases.

It is well-settled that a defendant's right to cross-examination under the Confrontation Clause "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v *Mississippi*, 410 U.S 284 (1973) Generally, the right to cross-examination is satisfied if defense counsel receives wide latitude to question witnesses at trial. *Delaware* v. *Fensterer*, 474 U.S 15, 20 (1985) (per curiam). Notably, the right of confrontation guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*

"The attorney-client privilege is the oldest of privileges for confidential communications known to the common law." *Unjohn Co.* v. *United States*, 449 U.S. 383, 389; *Swidler*, 524 U S at 410 (same). When this Court addressed a conflict between the right of confrontation and a state-created protection for juvenile offender information in *Davis*, the Court did not hold in absolute terms that the right of confrontation automatically trumps state-created interests regardless of the circumstances. Rather, this Court employed a balancing test *Davis*, 415 U S. at 319-400 (holding that on those facts, "the State's policy of protecting a juvenile offender . . . is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial witness").

Circuit courts of appeal have also applied a balancing test. In *Blackwell*, the Seventh Circuit held that a court "must ultimately decide whether the probative value of the alleged privileged communication was such that the defendant's right to effective cross-examination was substantially diminished." *Blackwell;* 688 F.3d at 501. The court upheld the trial court's limitation on cross-examination given that "the state trial and appellate courts balanced the interests served by the attorney-client privilege against what they determined to be the probative value of the offered testimony[.]" *Id.* Accordingly, the court was "particularly reluctant, in view of principles of federalism, to interfere and substitute [its] own judgment." *Id.* The court also distinguished *Davis*, noting that the trial court had not "blindly adhere[d] to the assertion of the privilege" *Id.*; see *United States* v. *Ranoine*, 32 F.3d 1203, (7th Cir. 1994) (the attorney-client privilege "might have to yield in a particular case if the right of confrontation . . . would be violated by its

enforcement" but concluding that "[a] trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney client privilege was a good reason"); *Jenkins* v. *Wainwright*, 763 F.2d 1390, 1392-93 (11th Cir 1985) (concluding that the trial court's limitation on cross-examination regarding matters protected by the attorney-client privilege "did not offend the Sixth Amendment" given that the trial judge permitted a wide latitude of questioning, "defense counsel conducted an extensive and pointed interrogation of" the witnesses, and "the cross-examination was more than adequate to expose the witnesses' bias and self-interest").

Similarly, here, the California appellate court, applying *Godlewski*, found that petitioner's interest in the letter was not outweighed by the attorney-client privilege. (Cert. Pet., App. at 123.) A fairminded jurist could reach this same conclusion after considering the probative value of the privileged information, the wide latitude counsel received in cross-examining Dinardo, the pointed and thorough cross-examination conducted by trial counsel, and the admissions counsel elicited during cross-examination, including Dinardo's motivations for testifying in this case.

The probative value of the letter was nominal because a vast majority of the letter was demonstrably false. As the district court correctly found, although an isolated excerpt from the letter would have benefitted petitioner, "other factual statements in the letter were either contradicted by trial testimony . . . or were demonstratively false in the light of other trial testimony[.]" (Cert. Pet., App. at 91). Since much of the letter was demonstrably false, "the clear falsehoods undermine the credibility of every other statement in the letter." (Cert. Pet.,

App. at 90.) The district court therefore concluded that, "taken as a whole, the intrinsic probative value of the letter was and is low." (*Id.*)

As the district court further explained, "the impeachment value of the letter would have been markedly attenuated because of the nature of the facts Dinardo asserted in the letter." (Cert. Pet., App. at 92.) Thus, "petitioner's right to effective cross-examination at the trial was not substantially diminished by the trial court's exclusion of the letter from evidence." (*Id.*) Notably, this finding was made under a de novo standard of review, rather than the deferential standard mandated by AEDPA that applies here.

Furthermore, petitioner's trial counsel extensively cross-examined Dinardo and thoroughly attacked his credibility. Trial counsel not only impeached Dinardo's credibility generally with, for example, prior convictions, but he also attacked his credibility through questions about any bias, prejudice or ulterior motive Dinardo might have for testifying in the manner he did in this particular case. This included an expected reduction in the charge from first-degree murder to manslaughter, an expected reduction in his sentence from 25-years-to-life to 12 years with an expectation of being released in five years, and Dinardo's desire to be reunited with his daughter. (Supp. App. at 10-11, 33-37.) Indeed, Dinardo admitted that he would have spent the rest of his life in prison had he not testified against petitioner. (Supp. App. at 10.) Trial counsel also elicited Dinardo's testimony that he had initially repeatedly denied his involvement in the robbery to the police. (Supp. App. at 17-19.)

Petitioner's trial counsel clearly exposed Dinardo's bias, prejudice or ulterior motive for testifying during cross-examination. "'[T]he exposure

of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678-79 (1986) (*quoting Davis*, 415 U.S. at 316-17, *citing Greene* v. *McElroy*, 360 U.S. 474, 496 (1959)).

In light of this testimony and the low probative value of the letter, it was entirely reasonable for the California appellate court to conclude that petitioner's right of confrontation was not violated by the restriction on cross-examination regarding the contents of Dinardo's letter. It cannot be said that no fairminded jurist could possibly disagree with that conclusion.

Moreover, any error was harmless. Petitioner mistakenly alleges that any alleged error would be reviewed under the standard set forth in *Chapman* v. *California*, 386 U.S. 18 (1967), whether the error was harmless beyond a reasonable doubt. But as this Court has held, in federal habeas cases, the question is whether the alleged error had a substantial and injurious effect or influence in determining the jury's verdict. See *Fry* v. *Pliler*, 551 U.S. 112 (2007). For the same reasons discussed above, namely, the fact that Dinardo was thoroughly impeached during cross-examination, not only generally but about his motivation for testifying in this case, that virtually the entire letter was demonstrably false, and its probative value was "low[,]" any error did not have a substantial and injurious effect or influence on the jury's verdict. Thus, habeas relief would be unavailable to petitioner.

In light of the foregoing, certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied

Dated: April 15, 2011

Respectfully submitted

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SUPPLEMENTAL APPENDIX A

FILED
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EXCERPTS FROM REPORTER'S TRANSCRIPT

[RT 248] . . . .

THE COURT: Mr. Peacock, I'm sorry, but you are prepared on this case and have been preparing on this case for a long time. And I think I've been very good about giving time in this case, including yesterday breaking early and breaking early before that time. I'm denying your motion for continuance. You can decide whether you want to make an opening statement or waive it. That's your choice. I'm going forward with this trial at this time.

MS. LOCKE-NOBLE: Your Honor, before we bring the jury in, I do have one more thing to inform the court and Mr. Peacock.

I do not have anything in writing with effect to this. But I was told during the course of the interview that I had with Mr. Dinardo that there was a letter that was written by Mr. Dinardo at the request and assistance of Mr. Murdoch and that during -- in this letter it's my understanding -- I have never read the letter, I've never seen the letter, nor do I have a copy of the letter; and Mr. Fuller indicated to me this morning that he did not have [RT 249] his complete file and so he did not have a copy of the letter with him, either, and doesn't know if he ever had a copy of the letter -- but that the letter I guess in sum and substance stated that Mr. Dinardo was coerced by the police into implicating defendant Murdoch in this crime. So I want to let counsel know about that, although I have nothing in writing to show him.

THE COURT: All right.

MS. LOCKE-NOBLE: I think that goes to possible impeachment which counsel brought up.

THE COURT: Okay.

. . . .

* * *

[RT 702] Have another half day off.

Don't discuss the case, form your opinions once again.

See you tomorrow at 9:30

(At 1: 52 p. m., the jury exited the courtroom, and the following proceedings were held in open court.)

THE COURT: Just to try to avoid any possible delays, Mr. Peacock, just – I'm not taking over the discovery here. That's the People's job to do. But if there is any discovery that's under 1054, you should be giving it over, please give it over so we don't get delays.

MR. PEACOCK: I will do so, Your Honor.

THE COURT: Anything you need to say?

MS. LOCKE-NOBLE: Only other thing is on the lines of discovery, I had mentioned to Mr. Peacock about a letter. I don't know if he ever came in possession of that letter that was allegedly written by

Dino Dinardo. I indicated I never had possession of it nor have I ever seen it, but if he did come in possession of it, I think that the people would be entitled to see that.

THE COURT: Mr Peacock, anything about – do you have the letter? And what do you say about that issue?

MR. PEACOCK: I don't have the letter.

MS LOCKE-NOBLE: Then that solves it.

THE COURT: Okay, see you tomorrow at 9.30.

An adjournment was taken to Wednesday, December 20, 1995, at 9:30 a.m.)

* * *

[RT 727] MR. PEACOCK Yes.

THE COURT So you give me that piece of paper, that document, you give me that, and then you can take your recess

MS. LOCKE-NOBLE: Thank you.

(A recess was taken.)
(Proceedings were held in open court out of the presence of the jury as follows:)

MR. PEACOCK: Your Honor, before we buzz the jury out

THE COURT: Yes, Mr. Peacock

MR. PEACOCK: Your Honor, Miss Locke-Noble had made mention in the last couple of days that there was a handwritten letter or note that, apparently, Mr. Dinardo had prepared, and prior to cross-examination, I'd ask for a copy of that.

I think that Mr. Dinardo's lawyer Mr Fuller may have a copy of that. And I believe it would probably be an inconsistent statement based upon what Mr. Dinardo, I believe, is going to testify

So I think it would be an inconsistent statement.

So I would ask the court to order Mr. Fuller to produce that document.

THE COURT: Do you have a letter that has something to do with his testimony here that you expect today?

MR. FULLER. Your Honor, I have a letter in my [RT 728] possession that may very well constitute an inconsistent statement.

The conditions under which it was produced, though, as I have advised Mr Peacock, are such that I do not believe that it is a truthful restatement of what occurred

THE COURT: What is your position regarding either turning it over to both counsel or to the court or both?

MR. FULLER: I am of the view, Your Honor, that it is part of my work-product, that I am not a

party to this proceeding in a direct manner, and that it is not my responsibility to deliver that to either side of this case.

But if the court orders me to do otherwise, I will do so.

THE COURT: I'm going to order you at this time to turn it over to me, and I will then tell you and other counsel whatever I feel I can turn over to them.

MR. FULLER: Your Honor, it is presently, I believe, I'm not certain I have a copy of it. I know I have seen it previously.

I do not know for sure that I have a copy of it.

It would be in my file which is in my office two blocks away. I did not bring my whole file with me

THE COURT: At the, either the break for lunch or if there is another break, could you do that for us?

I know you are only a few blocks away.

MR. FULLER: Certainly.

* * *

[RT 750] Even though you say you might prefer to do that first rather than last, that you have cross-examination that's likely to last half hour, hour, two hours?

MR PEACOCK. I can't say that.

THE COURT: I'm going to rule then that the trial should go forward. It's 11:30. That you have the information orally, you may or not get additional information

I think you will get additional information with specificity because the reporter is willing to do that.

The discovery supposedly was supposed to be complete.

I understand how all attorneys can say, well, new things came up or I didn't think of something, but I'm not going to recess from now till 1:30 because I think, in fairness, there is plenty to talk about, and the reason of starting with one thing rather than another, I do not believe, is error, and I'm going to order the trial go further.

MR. PEACOCK: Your Honor, also, with respect to Mr Fuller, I think he is present. Maybe the court can look at that information before we start up with cross so that I know if there's something that I may ask.

THE COURT. Yes.

I said I was going to do that.

Mr. Fuller, may I look at that, please?

MR. FULLER: Yes, Your Honor.

[RT 751] I have a two and three quarter page handwritten document that was delivered to the attorney prior to me, Mr. Star.

For the record, to be complete, I also note that the address on the envelope was also to Nelda Barrett who was at the time, I believe, Mr. Murdock's counsel

I will nevertheless indicate that I believe that that document falls, not only within the area of work-product, but also in the area of privileged client communication

And therefore, would ask the court not order that it be turned over to anybody.

THE COURT: Are you asserting as Mr. Dinardo's attorney the attorney-client privilege?

MR. FULLER: Yes, I am, Your Honor.

THE COURT: On his behalf?

I need to do some research on this issue of attorney-client privilege before I make a final ruling.

I will turn this over if I feel I should at the earlier possible time after I do the research, which will probably have to be during the lunch hour.

You may call the jury in.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT: Once again, all jurors are present in the courtroom, alternate as well.

Counsel present Witness on the witness stand.

[RT 752] Mr. Fuller is representing the witness.

Mr Peacock, you may commence cross-examination.

MR PEACOCK: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. PEACOCK:

Q Mr Dinardo, you are currently a convicted murderer; correct?

A Yes

Q And you were convicted of murder based upon the charges, the same that Mr Murdock is facing, correct?

A Yes.

Q And you went to a jury trial just like this with jurors seated in the box just like this, correct?

A Yes.

Q And in front of this judge, correct?

A Yes.

Q And that jury came back with a guilty verdict of a first-degree murder against you; is that right?

A Yes.

Q And you were sentenced about two months ago for a first-degree murder, and you were sentenced to 25 years to life in prison; isn't that right?

A Yes.

Q And what is your understanding of how long in custody you would do on a 25-year-to-life sentence?

A I was told I would be eligible for parole in 18 [RT 753] years, and then I would probably be denied parole, and then I would have to go back in another three years

So maybe after 21 years, I'd be eligible for parole.

Q And it's also your understanding that there was no guarantee that you would get out in 21 years, right?

A Yes

Q That you could stay in prison for the rest of your life, correct?

A Yes.

Q How old are you now, sir?

A I'm 35.

Q So you would stay in prison until you died.

A Pretty much

Q And by you coming in here and testifying today and saying that Charles Murdock was one of the people in the bar with you, you'll get out in about five years, won't you?

A That's what I've been told.

Q Your understanding is that your 25-year-to-life sentence and your first-degree murder conviction will be recalled and you will be allowed to plead to a manslaughter instead of murder, correct?

A Yes

Q And as part of that, you would be sentenced to twelve years, right?

A Yes.

Q And that twelve-year term would be reduced by the time that you been in custody already, correct?

[RT 754] A Yes.

Q And would also be reduced by half good time/work time credits, correct?

A Yes.

Q Which means you would be out in five years.

A Approximately.

Q And if you do not come into court and say that Mr Murdock was one of the people in the bar with you, you'll stay in prison on the 25-year-to-life sentence?

A Could you repeat that, please.

Q If you do not come into court and say that Mr Murdock was one of the people with you in the bar, you'll stay in prison at the 25-year-to-life sentence, correct?

A No.

I was told if I say a truthful testimony.

Q If you say truthful testimony, then you'll get out.

A I'll get the deal they offered me.

Q If you come into court and you say Mr. Murdock was not with you in the bar that night, you'll stay in on the 25-year-to-life sentence, won't you?

MS. LOCKE-NOBLE: Objection, Your Honor.

That misstates the testimony

THE COURT. That's not the way he said it.

Sustained.

Q BY MR. PEACOCK: Mr. Dinardo, you were part of the case with Mr. Murdock for approximately nine months [RT 755] before your trial in this case, right?

A Yes.

Q And you would come to and from court with Mr Murdock, correct?

A Yes.

Q And you would see Mr. Murdock in the lockup here, right?

A Yes.

Q Now let me go back.

After you were actually convicted and sentenced, you went to state prison, didn't you?

A Yes.

Q And you actually went to a particular state prison up north, correct?

A Yes.

Q And what prison was that?

A I was Wasco State Prison.

Q And you were classified as a state prisoner at that point, correct?

A Yes

Q And in fact, as you sit here today, you are a state prisoner, right?

A Yes

Q The suit that you are wearing here in court is not what they issue state prisoners, is it?

A No.

Q What you would wear in state prison is a jumpsuit, correct?

[RT 756] A Yes.

Q And you are not wearing that jumpsuit today.

You are wearing the suit for what reason?

A To testify here.

Q Convince the jury that you are telling the truth by looking more credible?

MS. LOCKE-NOBLE: Objection, Your Honor.

That is an inappropriate question.

THE COURT: That's argumentative.

That's sustained.

Q BY MR. PEACOCK: You are wearing the suit today because you want the jury to believe you, right?

MS. LOCKE-NOBLE. Objection, Your Honor.

Argumentative.

THE COURT: If you have an answer for that, you may.

THE WITNESS Well, it looks better than an orange jumpsuit.

Q BY MR. PEACOCK: Now when you got to state prison, that's when you contacted someone to say I want to testify against Mr. Murdock, correct?

A No.

Q When was it that you told people that you wanted to testify against Mr Murdock?

MR. FULLER: Your Honor, I'm going to interpose an objection at this time.

Attorney-client privilege.

THE COURT: Let me hear the answer, please, I mean, [RT 757] the question

(The record was read.)

THE COURT: I'll overrule it.

If you have an answer for that, keeping in mind the objection.

THE WITNESS: Approximately a month before I went to the state prison.

Q BY MR. PEACOCK. And at that time, you notified your attorney, is that right?

A Yes.

Q And at that time, you indicated that you would take a locked period of time in prison for being returned for your testimony, correct?

MR. FULLER: Objection.

Attorney-client privilege.

THE COURT It depends first on who you are asking him about so far as the conversation, like with whom.

MR PEACOCK: I'm asking about him, personally, not his lawyer

THE COURT: The ruling is that you can ask about his motivation himself

Why don't you do that and see where it takes you

Q BY MR. PEACOCK: Well, you indicated to your lawyer that you would be willing to come into court if you got a locked amount of time as opposed to a life sentence; correct?

A Could you repeat that

[RT 758] Q You indicated to your lawyer that you would be willing to come into court and testify against Mr. Murdock if you got a locked period of time.

A Yes.

Q Rather than a life sentence; correct?

A Yes.

Q Your purpose for being here today and testifying that Mr. Murdock was one of the people in the bar is so you can get out of prison early; isn't that right?

A Yes.

Q You are not here because you feel some social conscience that you need to tell people that this is what happened.

You are here so you can get out of prison, right?

A That's part of the reason.

Q And when you were first arrested on this case back in 1994, you were contacted by Detective Pavek, weren't you?

A Yes.

Q And he came up to Berkeley to arrest you on a warrant that had been issued for your arrest, right?

A Yes.

Q And he told you that he was investigating a robbery that occurred at the Horseshoe Bar, right?

A Yes.

Q And a murder that occurred at the Horseshoe Bar, correct?

[RT 759] A Yes.

Q And the first thing that you said when he asked you if you recognized this bar was I don't recognize that bar, right?

A Yeah.

Q You lied and told him that you didn't know anything about that bar and that you never been in that bar, right?

A Yes.

Q And he told you that your fingerprint had been found on the cash register in that bar, right?

A Yes

Q And you lied again and said there must be some sort of mistake, I've never been inside that bar, didn't you?

A Yes.

Q He told you that that bar was robbed, and you said it can't be me because I've never been inside that bar, I didn't do a robbery, correct?

A Yes.

Q That was also a lie, wasn't it?

A Yes.

Q You said I've done a lot of things in my life but I haven't done a robbery in that bar, right?

A Yes.

THE COURT: Mr. Peacock, I need about two minutes, a very brief recess, ladies and gentlemen. I have to talk to the supervising judge for a minute.

[RT 760] Sorry for sending you back into the room, but it won't be long.

Please don't discuss the case during the brief recess

(A recess was taken.)

THE COURT: We'll continue with the trial.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT. Jurors are back in court.

Counsel, defendant present.

You may continue your cross-examination.

MR. PEACOCK: Thank you, Your Honor.

Q Mr. Dinardo, when the police came up to Berkeley to talk to you, they had you in a room where they spoke to you, two officers; correct?

A Yes.

Q Detective Pavek and Detective McMann, right?

A Yes.

Q And you tried your best to convince them that you've never been inside the Horseshoe Bar, didn't you?

A Yes.

Q And you tried your best to convince them that you weren't part of any robbery in that bar, right?

A Yes

Q And you tried to convince them over a period of at least a half hour to 45 minutes that you had nothing to do with this robbery, didn't you?

A Yeah. About a half hour

[RT 761] Q At some point, the officers, during that interview, said to you we got you, your fingerprint is on this, and we know that you participated in this robbery with several other people; isn't that right?

A Yes.

Q And when they told you that they knew that you had participated in it, they showed you a photograph of Mr. Murdock, didn't they?

A Pardon me?

Q When they got you that way and said we know you participated in this, they showed you a picture of Mr. Murdock, correct?

MS. LOCKE-NOBLE: Objection, Your Honor.

I don't understand the question, "We got you."

MR PEACOCK: I'll rephrase it.

Q When they told you they didn't believe your denials, they said we've got your fingerprint on the cash register, right?

A Yes.

Q And they said we know that you participated in this robbery and we know you participated with other people, correct?

A Yes.

Q And they showed you a picture of Mr. Murdock during that interview, didn't they?

A Not at that time, no.

Q They showed you a picture of him, didn't they?

MS. LOCKE-NOBLE: Objection.

[RT 762] THE COURT: Is the question did they show him a person's picture at some time during the interview?

MR. PEACOCK: Yes

THE WITNESS: Yes.

Q BY MR PEACOCK: They showed you this picture of him, correct?

A That could have been the picture.

Q All right.

That photograph of Mr. Murdock has No. 4 on it, correct?

A Right

Q They said we know this is one of the guys you participated in the robbery with?

A No.

Q They never told you that?

A No.

Q When they showed you that picture, you talked about the other people that you were involved in this robbery with, right?

A Pardon me?

Q When they showed you that picture, they asked you about the other people that you were involved in the other robbery with, right?

A No.

Q They didn't ask you about any other people that you were with?

A No.

Q Did you ever tell them at some point during the [RT 763] interview that you were with two other people?

A Yes.

Q And you told them I don't know those guys' names, right

A Right

Q And you've never seen those guys before, right?

A No.

Q They ever show you a picture of any of those guys?

A No.

Q Ever show you any other photographs besides the ones that you are looking at in front of you?

A Yes.

Q What other photographs did they show you?

A They showed a photograph of myself and some other Mexican Americans

Q You didn't identify anybody else besides this photograph; is that right?

A No.

Q Do you know the other photographs they showed of Mexican Americans?

MS. LOCKE-NOBLE: Your Honor, I didn't get the last answer to the last question.

(The record was read.)

THE COURT: Do you have what you need?

MS. LOCKE-NOBLE: Yes

THE COURT: You may go forward.

Q BY MR. PEACOCK: Do you know the other [RT 764] photographs that you looked at of the Mexican Americans?

Would you recognize those if you saw them again?

A A couple of them, 'cause a couple of them are really distinct pictures.

Q Did you know any of those people when they showed you the photographs?

A I think I saw one of them before.

Q Before what?

A Years ago one looked vaguely familiar, like somebody I had run into.

Q Tell the police officers that?

A No.

Q Portion of this interview, the first hour and 15 minutes of the interview with these officers, was not tape recorded, was it?

A To my knowledge, no Yeah.

No, it wasn't.

Q All right.

And during that period of time when it was not tape recorded is when you were going through all the denials of you being inside that bar, right?

A Yes.

Q And also the period of time when you were shown this photograph of Mr. Murdock was also during the time when it was not recorded, right?

A Yes.

Q During the course of that interview before it [RT 765] was recorded, you had some discussion with Detective Pavek and Detective McMann about what you would get in return for giving a statement to them, didn't you?

A Could you repeat that.

Q During the period of time before this interview was recorded, you had some discussion with Detective Pavek and Detective McMann about what you would get in return for giving them a statement?

A No. No.

Q Did you ever have any discussion with them about whether or not you would get released if you gave them a statement?

A No.

Q Did you ever have any discussion that you would maybe get to be reunited with your family if you gave them a statement?

A No.

Q Did you ever have any discussion that you would maybe get to go see your family?

A Yes.

Q And as part of that, the fact that you would get to go see your family, you decided to give him a statement, right?

A No.

Q Did you have the discussion about the family and whether you would get to see them before the interview was tape recorded?

A I asked him, they told me they were going to [RT 766] take me to Long Beach, and I asked the detective if I could see my spouse and my child before I left. And they said we'll think about it. We'll see.

Q That happened before the interview was tape recorded, wasn't it?

A Before and after

Q All right.

After the tape was turned off, right?

A (Nods head up and down.)

Q Is that yes?

A Yes

Q Did that happen after you were lying and saying I wasn't involved in this robbery at all, right?

A Yes

MS. LOCKE-NOBLE: Your Honor, could I have that repeated.

(The record was read.)

Q BY MR. PEACOCK: In fact, after you gave this statement and after you indicated that Mr. Murdock was one of the guys in the bar, you got to go see your family again before you were brought to Long Beach, right?

A Yes.

Q And before your trial, you tried to get your statement suppressed by saying that you been offered this deal, right?

MR FULLER: Your Honor, I'm going to object.

Calls for a conclusion on the part of this witness.

[RT 767] MS. LOCKE NOBLE: I would also object, Your Honor.

I don't understand the question

MR. PEACOCK. I'll rephrase the question

THE COURT: Okay, rephrase it

Q BY MR PEACOCK: Mr. Dinardo, before your trial, you testified just like you are today, right?

Isn't that true

THE COURT Wait a minute.

That's too broad.

I don't know what you mean.

That covers a lot of questions.

Q BY MR. PEACOCK: Before your trial began, you testified about the details of the statement that you gave Detective Pavek, correct?

A One more time.

Q Before your trial, you testified about the details of the statement that you gave to Detective Pavek, correct?

A Yes.

Q And you testified about details about what they had offered you in return for your statement, correct?

A Yes.

Q What were the details that you testified to with respect to what you were offered for your statement?

A What I testified to?

Q Yes.

A I believe I testified to the fact that they let me see my spouse and my child.

[RT 768] Q And that was one of the reasons why you gave a statement; isn't it?

A No

Q That had no part of why you gave the statement?

A No

THE COURT: Mr. Peacock, I'm sorry, I know you got plenty more questions, but I have one thing I have to take up with counsel before lunchtime.

So we are going to break till 1:30.

I, hopefully, I don't have other calendar matters.

I know I had some, but I'll try and work them in somehow this afternoon.

Please don't discuss the case or form your opinions on the evidence yet

We'll see you at 1:30.

Have a nice lunch

(At 11.56 a.m., a recess was taken until 1:30 p m of the same day.))

(Proceedings were held in open court out of the presence of the jury as follows)

THE COURT. Jury is not here, counsel are, including Mr. Fuller, who is part of what I'm doing here, and I'm pleased that he's here.

Research I've done plus the knowledge I have about the attorney-client privilege, in my opinion and my ruling is, does in fact apply to the documents that [RT 769] Mr. Fuller turned over.

Frankly, I think if he declined to turn the documents over, he was probably within his rights.

But we have gotten this far. And so I'm making a record of it.

What I'm going to do is, because I see no exception to the attorney-client privilege, in my opinion, it's inviolate insofar as these facts are concerned, I'm going to give the documents to Mr. Fuller, but I'm going to ask and I hope it's an order that's valid, that you keep these documents in case there are any further proceedings on the documents so that you'll have them in your possession

Can you do that, Mr Fuller?

MR. FULLER: Certainly, Your Honor

THE COURT: Because they are your documents, and because of the ruling I made here in open court, so if anybody wants to challenge this at some future time, they may. That's what I'm doing in this case.

MR PEACOCK: Your Honor, I would ask that we at least keep a copy in the court file

THE COURT: I'm not keeping a copy in the court file.

That's what I'm doing intentionally. That's why I'm ordering Mr. Fuller to keep them in case there are further legal proceedings.

Everything I've done is out front.

MR. PEACOCK: Well, my problem is is that in the event that this goes up on appeal, the appellate court is [RT 770 – 800] not going to have a copy of that.

THE COURT: First you'd have to make a motion to undo what I just did, obviously, in front of this court or some other court or the D.C.A. because I feel I have done what I should do under the law.

I feel I probably didn't have the right to have those papers in the first place, and we had a lawyer who gets put in a squeeze when the judge asks for papers and that's why I'm doing what I've done.

I'm ordering him to keep those papers in case later, if your client is convicted, you or any other attorney wants to make a motion on this issue, it's all out front.

(At 12:00 noon, a recess was taken until 1:30 p.m. of the same day.)

* * *

[RT 858] Following proceedings were held in open court:)

THE COURT. Morning once again, ladies and gentlemen. I did better yesterday than I did today.

All jurors are present. Both counsel and defendant ad present

Dino Dinardo,

resumed the stand and testified further as follows:

THE COURT: Mr. Dinardo, state your name for the record once again.

THE WITNESS: Dino Dinardo. D-I-N-O. D-I-N-A-R-D-O.

(Page 859 was prepared under separate cover for appellate purposes, sealed in an envelope, and filed along with the appeal transcript.)

[RT 860-1] THE COURT: You may proceed

CROSS-EXAMINATION (CONTINUED)

BY MR. PEACOCK:

Q When we left off, we were talking about your interview with Detective Pavek and Detective Mc Mann of the Berkeley Police Department back in the middle of 1994; correct?

A I believe so.

Q Now, I think you'd testified yesterday that for about a hour and 15 minutes there was a conversation going on between you and Detective Pavek and Detective Mc Mann before the tape recording was started; correct?

A An hour and 15 before the tape recorder?

Q Correct.

A I don't -- I think it was like a half hour actually.

Q During that period of time, before the tape recorder had gone on, some of that time was spent you denying ever being in the Horseshoe Bar; correct?

A Yes.

Q And denying the fact that you had committed a robbery of that bar; correct?

A Yes.

Q And at some point you'd indicated to Detective Pavek and Detective Mc Mann that you were concerned about your daughter being left at the house [RT 860-2] without you there; correct?

A Yes.

Q And you had conveyed that to Detective Pavek and Detective Mc Mann that you were troubled by your daughter being left home alone; correct?

A Yes

Q And during that same period of time that the tape recording was not on is when they showed you a picture of Mr. Murdoch; correct?

A Pardon me?

Q During that same period of time when the tape recorder was not on, that's when they showed you a picture of Mr. Murdoch, correct?

A It was after the interview.

Q All right. They show you a picture of Mr. Murdoch prior to the tape recording being brought on?

A No.

Q Now, during that period of time when the tape recorder was not on, you felt that if you cooperated with Detective Pavek and Detective Mc Mann, if you helped them, that they would release you; isn't that right?

A I felt at the time that I would at least get to see my daughter. The more I look back at it now, I knew I was in custody and I knew it wasn't going to be easy for me to get out of custody, so all I wanted to do was cooperate.

Q You were trying to get out of custody; right?

A Yes.

[RT 860-3] Q And you would have said whatever it took to get out of custody so that you could get reunited with your daughter?

A Yes.

Q And that would include pointing out someone else that may, may have been involved in the crime if you thought the police wanted you to point out --

A I was trying to be helpful in any way.

Q Because you thought if you were helpful to them that you would get released from custody, isn't that right?

A Yes.

Q And, in fact, you thought that if you pointed out somebody else and helped them locate someone else that you would get released from custody, as well; correct?

A That's part of the helping out.

Q And during the period of time that you were having the conversation with these detectives, you indicated that -- let me strike that

During that same period of time that you were speaking to the detectives, this occurred while the tape recording was on off and you were talking about being reunited with your daughter; correct?

A Can you repeat that?

Q During the period of time that the tape recording was not on, that you were talking about being reunited with your daughter, right?

A Yes.

[RT 860-4] Q And during the entire time that the tape recording was on, you also felt that if you helped them that you would get out of custody; right?

A Yes.

Can I rephrase that?

THE COURT: You may explain your answer.

Q BY MR. PEACOCK: No.

THE COURT: Yes.

THE WITNESS: I felt that it would help my custody situation if I helped. It was a very confusing moment for me, and a lot of things were going through my mind. Not hearing the charges I was charged with at the time, if I had known I'd been charged for murder, I would have had my logistics all different. But I never heard the "murder" word, so I felt that I was just there in a capacity of being a thief.

Q BY MR PEACOCK: Well, at some point before you were even brought to the station, you were apprised that you were under arrest for murder, weren't you?

A I was never told I was under arrest for murder.

Q What point were you told you were under arrest for murder?

A When I got to the Long Beach Jail and I saw my pink slip, and it said "murder" on it.

Q And the conversation that you had with Detective Pavek, before you were brought down to the station, you are telling us he never told you anything about [RT 860-5] a death occurring at this robbery?

A Well, yes. He told me. He showed me pictures of a dead person, and obviously it was a murder. But I didn't know any of the California statutes of law about abating [as spoken] -- abating [as spoken] and, you know, what felon and conspiroting [as spoken], you know, about the other person. And my ignorance of the law, I felt that the capacity of my crime, since Mr. Pavek explained to me he knew I wasn't the shooter, that kind of gave me a little sigh of relief that, well, at least I thought in my mind I'm not getting arrested for murder

Q He showed you a picture of somebody that was dead, right?

A Yeah. But he also told me, "We know you're not the shooter."

Q Well, then you knew that you weren't just there for being a thief, you were there as being part of a robbery-murder; right?

A Yeah. But like I said, again, being ignorant of the law of being at the scene of the crime when a murder is committed, I didn't know that I'd be subject to murder, also.

Q Well, did you think that Detective Pavek and Detective Mc Mann had come all the way up to Berkeley just to talk to you about being a thief?

MS. LOCKE-NOBLE: Objection, argumentative.

THE COURT: I'll allow an answer if you have an answer to that.

[RT 860-6] THE WITNESS: Well, they were -- I felt they were leading up -- they had a main suspect in this case and they were trying to find out who the murderer was, and I figured, well, I didn't hear any charge of murder, so I was still in the clear on that count, but I knew I was guilty of other infractions.

Q BY MR. PEACOCK. And they told you that they had a main suspect that they were looking for during the untaped portion of the interview, right?

A No.

Q When did they tell you that?

MR FULLER: Objection, your honor, assumes a fact not in evidence.

I don't know if I have standing to make that objection.

THE COURT: Rephrase that if you want to make it, Mr Peacock.

Q BY MR. PEACOCK: Yesterday when we talked about the untaped portion of the interview, I asked you specifically if after you had lied about being involved in it they had said to you "we know you are involved in it, and we know that the other

people were involved in it." Didn't they say that to you before the taped recording?

A Well, other people, nobody specific.

Q Well, they told you they were looking for the other people, as well, weren't they?

A Yes

Q All right. And they told you that before the [RT 860-7] tape recording was even started; correct?

A Yes.

Q And your whole mind set was to try to get out of custody and if you thought by helping that you would get out of custody; right?

MS. LOCKE-NOBLE: Objection, Your Honor, compound

MR. PEACOCK: I will break it down, Your Honor.

THE COURT: Break it down.

Q BY MR. PEACOCK: You thought that by helping them and pointing the finger at somebody else that you would get out of custody; isn't that true?

A I wanted to help.

Q You thought by pointing the finger at somebody else that you would get released; isn't that true?

MS. LOCKE-NOBLE: Objection, Your Honor. asked and answered and argumentative.

THE COURT: I will allow one last time.

Did you think you were actually going to get released or not. Did you know what was going through your mind?

THE WITNESS: Not at that time I knew I wasn't going to get released, but I figured it would lessen my charges.

MR. PEACOCK: Your Honor, I'd like to refer to the transcript.

THE COURT: Sure.

MR PEACOCK: Page 21.

THE COURT: Okay.

If I can get hold of a transcript. First tell [RT 860-8] me if you have any objection –

MS . LOCKE-NOBLE: I don't know what lines.

MR. PEACOCK: It would be lines 4 through 7

THE COURT: -- Whether you have any objection to reading that as prior testimony in his own trial or leading up to his own trial

MS. LOCKE-NOBLE: May I just have a moment, Your Honor?

THE COURT: Sure

MS. LOCKE-NOBLE. I have no objection.

THE COURT: Read it as his prior testimony.

Q BY MR. PEACOCK: You recall testifying on May 22nd of this year before your trial; correct?

A Yes.

Q And you remember being asked the question:

"No charges were going to be filed against you?"

Your answer:

"I believe some type of -- no, actually, I believe that if I could just help them in their pursuit of someone that I would be released on the spot."

Do you remember testifying –

A Yeah, I said that.

Q And that's what your thought process was throughout the entire taped interview, correct?

A That was one of them. At a certain time of the interview.

[RT 860-9] Q All right. So your feeling was before the tape recording even began that if you helped them find someone involved in this crime that you would get released on the spot; correct?

A At one point in time; but as the interview went on, and I knew I wasn't going to be released

Q Well, you knew you weren't going to be released after the interview was over and the police said "We're not going to reunite you with your daughter today"; isn't that right?

MS. LOCKE NOBLE: Objection, Your Honor, unintelligible.

THE COURT: Are you asking him what time he came to that conclusion?

MR. PEACOCK: I will rephrase it

Q At the time the interview was over, you knew at that point the police had trapped you and that you weren't going to be released?

MS. LOCKE-NOBLE: Objection, argumentative.

THE COURT: That's sustained.

Q BY MR. PEACOCK Mr. Dinardo, you knew at the end of the interview you weren't going to be released?

A Yes

Q That's the first time you realized you weren't going to be released?

MS. LOCKE-NOBLE: Objection, Your Honor, vague as to what point in time. At the very end of the interview?

Q BY MR. PEACOCK: Referring to is that the very [RT 860-10] first time you weren't going to be released, only when the interview was totally over? Or was it sometime earlier?

A It was earlier I knew I wasn't going to get released.

Q What made you think you weren't going to get released?

A Well, just the way the interview was going, and I could see, I was reading the faces of the detectives that "well, now that he's talked, we have a lead, we're going to have to file formal charges." Well, if the detectives told me what I was under arrest for -- and this is truthful, I can't remember them telling me or I didn't hear it or I blocked it out of my mind But at no point did I hear I was under arrest for murder I heard the word "murder." I heard the word "robbery." I heard the word "shooter." I heard the words "stealing money." But I couldn't put all that on myself as being the murderer because in my heart I knew I wasn't the murderer The police knew I wasn't the murderer So I felt I was immune to being the murderer and thus not being charged for murder.

So that was my -- my recollection of my thought process. And when I said that in that interview -- I mean, in that hearing, that was the best of my recollection that I -- what I was thinking at the time

Q Your thinking throughout the entire untaped portion of the interview was if you helped them locate someone as being the shooter, you would get released. True?

MS. LOCKE-NOBLE: Objection, Your Honor, asked and [RT 860-11] answered.

THE COURT: I guess one more time.

Was that through the entire conversation?

MR. PEACOCK: I'm talking about the untaped portion, Your Honor

MS. LOCKE-NOBLE: There is two untaped portions, so which untaped portion are we talking about, at the beginning or at the end?

THE COURT: The first untaped portion, assuming there are two?

MR. PEACOCK: The first untaped portion.

THE COURT. The entire time until the time you learned they turned on the tape recorder, was that your thinking or not?

THE WITNESS. Your Honor, no. No I -- I was kidding myself if I thought I was going to be released at that time.

Q BY MR. PEACOCK: Now, you also thought during the period of this interview that if you told the police officers that someone was involved in this crime, other than yourself, that potentially

you would get subpoenaed to testify against that person; right?

A That's what I was thinking, yes.

Q And you told the court that when you testified earlier?

A Yes.

Q That you thought that you might be released because you could get subpoenaed and testify against [RT 860-12] somebody; correct?

A That ran across my mind, yes

Q And that happened before the tape recording was even started; right?

A Yes.

MR. PEACOCK: If I can just have a moment, please

THE COURT: Yes

Q BY MR. PEACOCK: Now, after the interview took place, you did go to get your daughter for some period of time; correct?

A Yes.

Q When did that happen?

A The next day.

Q You weren't released then, though; right?

A No

Q You were actually flown down to Long Beach and a criminal complaint was filed against you; correct?

A Yes.

Q Mr. Dinardo, you also have some other convictions besides the first degree murder conviction that we talked about yesterday; correct?

A Yes.

Q And you have a conviction for grand theft as a misdemeanor back in 1982; correct?

A Yes.

Q Before the crime you were involved in on this case; right?

A Yes.

[RT 860-13] Q And after the crime you were involved in on this case, you were convicted of a theft, a petty theft back in 1984; correct?

A Yes.

Q Now, as part of your coming to court and testifying in this case, you don't come to court wearing handcuffs or shackled up; correct?

A Pardon me?

Q You don't come to court when you testify here wearing shackles or handcuffed; right?

A No

Q You walk out the front door and you walk around the hallways that the general public uses; right?

A Yes.

Q And when you are done testifying here, you go downstairs and you get to hang around outside in front of the building and have a cigarette; right?

A Is this recently or

Q Well, yesterday you did it; right?

A Yes.

Q And you weren't handcuffed when you were outside, were you?

A No

Q And you weren't brought over from Long Beach Police Department in the tunnel where most of the custody comes from?

MS. LOCKE-NOBLE: Objection Your Honor, calls for speculation.

[RT 860-14] THE COURT: That's a statement, Mr Peacock.

Q BY MR. PEACOCK: You familiar with the tunnel underneath the building that you come over with?

A Yes.

Q When you come over here to testify, do you have to use that tunnel?

MS. LOCKE-NOBLE. Objection, Your Honor, Irrelevant.

THE COURT. I'll allow it.

THE WITNESS: No

Q BY MR. PEACOCK: In fact, when you walk back over to the courthouse, you are completely unshackled, no handcuffs, nothing on your feet; right?

A I was handcuffed up until yesterday one pass they didn't handcuff me.

Q And when we were on recess here, you get to go out in the hallway and wander, around unhandcuffed?

A Just once, yes

MR. PEACOCK: Thank you, Your Honor. I have nothing further

THE COURT: Is there redirect?

MS. LOCKE-NOBLE. Yes, Your Honor.

May I approach the witness, Your Honor?

THE COURT: Yes.

* * *

[RT 860-30] RECROSS-EXAMINATION

BY MR PEACOCK:

Q Mr. Dinardo, you told us there was a point in the transcript about midway through where you realized you weren't going to get out of jail, right?

A Yes.

Q Remember testifying before your trial in this case?

A Pardon me?

Q Do you remember testifying before your trial at the hearing in this case?

A Yes

MR PEACOCK: And for court and counsel, I'm going to refer to page 26, lines 25 to 28; page 27, lines 1 and 2

MS LOCKE-NOBLE. Which lines again?

MR. PEACOCK. 25 through 28, page 26

THE COURT: Page 27 lines?

MR. PEACOCK: 1 and 2.

MS LOCKE-NOBLE: No objection.

THE COURT You may read it.

Q BY MR PEACOCK: Mr. Dinardo, do you recall testifying and being asked this question?

"At what point did you feel you were not going to be released?"

Your answer was:

"When they told me I was going to spend the night at Berkeley Jail."

The following question was.

[RT 860-31] "Was that after the tape-recorded conversation?"

Your answer was:

"Yes"

That was your previous testimony in this case; correct?

A Yes

Q Now you are telling us that halfway through this interview you realized you weren't going to be released; right?

A Um, no, I knew I was going during that taped interview, but that just confirmed it when they said I was going to spend the night in Berkeley Jail.

Q During the taped interview you testified earlier that you thought, at least during some of the interview you thought that if you provided information about somebody else that you would get released on the spot, correct?

A I testified to that?

Q Yes.

A I -- I can't remember testifying like that. If I could see it, I could probably remember.

Q Well, for an hour and 15 minutes before this tape recorder was ever turned on, you and Detective Pavek and Mc Mann had an extensive conversation, correct?

A Yes.

Q And you had the conversations about your being released and reunited with the daughter, didn't you?

[RT 860-32] A Yes.

Q And you had conversations about that if you provided information about somebody else involved in the crime that you thought you would be released; right?

A Yes.

Q And that happened, before this tape was even turned on –

A Yes.

Q Correct?

And that was your thought process through the entire tape that this was -- the tape was going; correct?

A No.

Q You testified that halfway through you realized that you wouldn't get released; right?

A Yes.

Q Even though previously you testified that you didn't realize that until after the tape was turned off; right?

A Well, it was vague to my memory.

Q You told us that your conscience would feel better if you got up here and you testified; right?

A Yes.

Q In fact, your conscience only got better after you got sentenced to 25 years to life in prison, isn't that right?

A Pardon me?

Q Your conscience only became developed when you got sentenced to 25 years to life to prison; right?

[RT 860-33] A No.

Q You could have pled guilty to these charges before your trial, right?

MR. FULLER: Object.

MS. LOCKE-NOBLE: Objection.

THE COURT: That's sustained. You may ask another question.

Q BY MR. PEACOCK: You went to trial just like Mr. Murdoch is, in a court with a jury?

MS. LOCKE-NOBLE: Your Honor, I'm going to object. That's an inappropriate question.

THE COURT: I will allow it.

Did you go to trial to a jury? Did you?

THE WITNESS: Yes.

Q BY MR. PEACOCK: And the purpose of you testifying before your trial was to say that your confession was coerced from you; correct?

A Yes.

Q You were trying to avoid responsibility for your actions even then, weren't you?

MR FULLER: Your Honor, excuse me, but I'm going to interpose an objection unless a follow up question is allowed, and that is at whose direction these decisions were made

THE COURT: Well, yes, I don't think I'm in a position to order how the cross-examination takes -- what form it takes.

THE WITNESS: Can you repeat that?

[RT 860-34] THE COURT: Miss Velez, would you read the last question

(The question was read.)

THE WITNESS: Yes.

Q BY MR. PEACOCK You were trying to avoid responsibility for your actions when the interview first started with Detective Pavek when you lied about not being in that bar?

MS. LOCKE-NOBLE: Objection, Your Honor, Argumentative

THE COURT: That's been asked and answered several times. Sustained.

Q BY MR. PEACOCK: You have tried to avoid responsibility for your actions all through this case, haven't you?

MS. LOCKE-NOBLE: Objection, asked and answered.

THE COURT That's been covered, Mr Peacock You can go into, as you started to, the things that were just brought up. That's what recross is for.

Unfortunately, I promised another lawyer I'm going to hear a short case. Do you have a rough idea how long you are likely to be?

MR PEACOCK I would say 10 minutes.

THE COURT: We are going to have to resume.

If you are not here until 1:40, I can't make you. That's the time we are probably going to start

Don't discuss the case Don't form the opinions on the evidence yet

[RT 860-35] We will see you at no later than 1:40

(At 12:01 p m., a lunch recess was taken until 1:40 p m. of the same day)

* * *

[RT 861] Long Beach, California;
Thursday, December 21, 1995; 1:55
Department South "K"
Hon. Charles D Sheldon, Judge

Appearances:

The defendant with his counsel, Stephen Peacock, appointed counsel pursuant to Penal Code section 987.2; Corene Locke-Noble, Deputy District

Attorney of Los Angeles County representing the People of the State of California.

(Barbara Matsukane, official reporter.)

THE COURT: We are on the record on the Murdock case.

Because counsel will have to know, you need a decision regarding witnesses.

I have read the People's cases, People versus Brown, 40 Cal.3d 512, and People versus Plasencia, 168 Cal.App.3d 546.

I have my own index of cases, and over the years, I've read. A lot of cases on eyewitness experts, et cetera.

On balance, I believe I should allow an expert for the defense to testify if they are going to call one, and I rule that Miss Pezdek can testify.

(Proceedings were resumed in open court in the presence of the jury as follows:)

THE COURT: All the jurors are now here, both counsel, defendant.

Mr. Peacock, you can finish up your recross.

MR. PEACOCK: Thank you, Your Honor.

[RT 862] RECROSS EXAMINATION (RESUMED)

BY MR. PEACOCK:

Q Mr. Dinardo, you indicated that you were going to be housed in a special location within the state prison.

Do you know which prison you are going to be housed at?

A No, I don't.

Q Have you had any discussions at all with respect to what sort of conditions that housing will take place?

A No, I haven't.

Q Have you been told by anyone that you will be able to have free access in and out of the prison?

A No, I haven't

Q Have you been told that you would potentially have more family visits or something of that nature as part of your housing?

A No.

Q No?

Have you been told that you would potentially get some sort of better job or better food or anything of that nature?

A No.

Q Has it been indicated to you that you would be able to potentially be under some sort of electronic surveillance or halfway house as part of this special location where you'll be housed?

[RT 863] A No

Q And the special housing that you will be obtaining as part of your testimony, is that going to be arranged for you by Detective Pavek?

A I'm not sure.

Q Is Detective Pavek, to your knowledge, going to help arrange your housing?

A I believed it was up to the district attorney's office.

Q And is Detective Pavek somehow involved in that as well to your knowledge?

A If he's working with the district attorney, I believe so.

MR. PEACOCK: Thank you, Your Honor.

I have nothing further.

THE COURT: Anything else, Miss Locke-Noble?

MS. LOCKE-NOBLE: Yes, Your Honor.

Thank you.

FURTHER REDIRECT EXAMINATION

BY MS. LOCKE-NOBLE:

Q Do you expect to be treated differently or with more favoritism than the inmates in general population when you are placed in protective custody?

A No.

Q Did you expect to be able to come and go at will from the prison as a result of your testimony?

A No.

* * *

[RT 878] Q Did you ever see the gun?

A No

Q He just told you he had a gun?

A Yes.

Q Did he have something that would lead you to believe that he did have a gun?

A Did -- pardon me?

Q Did he have something with him that would lead you to believe that he had a gun?

A He had a bag, a little small duffle bag, well, it was kind of (indicating) a duffle bag about this big, three feet.

MS LOCKE-NOBLE: Indicating, for the record, approximately three to four feet, Your Honor

THE COURT: Roughly

MS. LOCKE-NOBLE: I have nothing further at this time, Your Honor.

THE COURT: Re-recross?

FURTHER RECROSS-EXAMINATION

BY MR. PEACOCK:

Q Mr. Dinardo, the story about seeing Mr. Murdock coming in, asking you about pulling another job, this is the first time you said this to anybody; is that right?

A No.

Q Who else have you told?

A Detective Pavek.

Q How long ago did you talk to Detective Pavek?

[RT 879] A The day I was arrested.

Q You told him at that time that Mr. Murdock asked you to pull another job the weekend after?

A Pardon me?

Q You told Detective Pavek when he interviewed you that Mr. Murdock asked you to pull another job the weekend after in 1983?

A No.

He asked me when I had seen him next, and I told him that I saw him at the park.

Q Did you ever tell –

THE COURT: Just a minute.

Had you finished your answer telling him you had seen him at the park?

THE WITNESS: Yeah, and did I want to do another job and he had a gun to do it with.

Q BY MR. PEACOCK Your testimony is that you told Detective Pavek that in -- you told him that Mr. Murdock told you he wanted to pull another job.

A Pardon me?

Q Your testimony is that you told Detective Pavek that Mr. Murdock told you that he wanted to do another job?

A Yes.

A When did you tell him that?

A The day I was arrested

Q How come that's not anywhere in your taped transcript?

MS. LOCKE-NOBLE: Objection.

[RT 880] THE COURT: That's sustained.

Q BY MR. PEACOCK: That's not in the transcript at all.

MS LOCKE-NOBLE: Objection, Your Honor.

THE COURT: That's sustained.

The tape is there for everybody to listen to. They already have.

Q BY MR. PEACOCK: Mr. Dinardo, you looked at a transcript of that tape today, didn't you?

A Yes.

MS LOCKE-NOBLE: Your Honor, may we approach?

THE WITNESS: Can I answer the question?

THE COURT: One question at a time.

You may ask another question

Q BY MR PEACOCK: You read a copy of that transcript of the tape today?

A Yes.

MS. LOCKE-NOBLE: Your Honor, there was some redactions on that tape.

Counsel is perhaps forgetting that.

THE COURT. That's true That's true. You're right.

MS. LOCKE-NOBLE: I think this is –

THE COURT: Ordered by this court.

MS LOCKE-NOBLE: And I think this is one of the areas.

THE COURT. Mr Peacock, you may ask another question, but keep that in mind.

[RT 881] Q BY MR PEACOCK: Mr. Dinardo, at no point during the taped part of the interview did you tell Detective Pavek Mr Dinardo -- Mr Murdock wanted to pull another job with you in Dominguez Park, did you?

A I said it on the tape

THE COURT: Mr. Peacock, you may be opening –

MR PEACOCK: I'm stopping at that question, Your Honor.

Q And your testimony is that you told him no way, you wanted nothing to do with that; is that right?

A Yes

Q And you're saying that you wanted nothing to do with that because you didn't want to be involved in another theft; is that right?

A Yes.

Q Well, the next year, in fact, Mr. Dinardo, you were involved in another theft, weren't you?

A Yes.

Q So you're telling everybody that you were so clean, that you couldn't be involved in another theft, is that right?

THE WITNESS. If I can –

MS. LOCKE-NOBLE: Objection –

THE COURT: You may answer.

THE WITNESS: I feel stealing a pack of cigarettes and robbing somebody at gunpoint is two different types of theft, sir.

Q BY MR. PEACOCK: You testified earlier that the [RT 882] first day that you were arrested, you felt it was the right thing to do to testify against Mr. Murdock; is that right?

A Yes.

Q How come you lied about your involvement to Detective Pavek?

A Well, that's the first natural reaction to deny everything in my position I was scared

I didn't know what kind of evidence they had on me until they showed me the fingerprint card and the pictures and they knew it was me and they had forms where they looked legitimate of CID fingerprint department that identified me as the suspect

Q So if they didn't have any of that evidence, You would have continued to lie, wouldn't you?

A Probably, yes

Q So I guess your social conscience about not being involved in any robberies didn't bother you at that point; right?

MS LOCKE-NOBLE: Objection, Your Honor. Argumentative

THE COURT: I'll allow the answer.

THE WITNESS: Well, I was soon to admit it after that because my conscience started playing on me at that moment

Q . BY MR PEACOCK: Had Detective Pavek not shown you anything, you never would have admitted anything, would you?

A Of course not.

[RT 883] MR. PEACOCK: I don't have anything further, Your Honor.

Thank you.

THE COURT: Anything else, Ms. Locke-Noble?

MR. PEACOCK: May I have just a moment, Your Honor?

THE COURT: Yes.

Let's briefly go to side bar.

I don't need the reporter.

(Proceedings were held at the bench which were not reported.)

MS. LOCKE-NOBLE: Just a moment, Your Honor.

May I approach the witness?

THE COURT: Yes, you may.

FURTHER REDIRECT EXAMINATION

BY MS. LOCKE-NOBLE:

Q First showing you a copy of the transcript which you saw earlier this morning that was marked People's No. 26 for identification.

Going through that particular transcript on page 8, at line 15, there appears to be a black marking, is that correct?

A Yes.

Q Okay.

Just above that at line 14, it indicates that you saw the defendant one time after that at Dominguez Park.

Do you see that?

[RT 884] A Yes.

Q Taking a look at another page 8, which is not blacked out at line 15, can you read just what line 15 says.

A "And he had a duffle bag with a sawed-off shotgun in it."

Q And is that what you told Detective Pavek?

A Yes.

MS. LOCKE-NOBLE: I have nothing further, Your Honor.

THE COURT: Anything?

MR. PEACOCK: No re-recross.

THE COURT: Okay.

Mr. Dinardo, you are finished with your testimony now.

I'm going to have you on call and kept in Long Beach until this trial is over, until the case goes to the jury, in any event.

So you are free to go within your custody status.

THE WITNESS: Merry Christmas.

THE COURT: Counsel?

MS. LOCKE-NOBLE: People call Detective Pavek.

THE COURT: Mr. Pavek, if you come up to be sworn, please.

* * * * * * * *

SUPPLEMENTAL APPENDIX B

FILED
APR 22 1997

2d Crim. B100877

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v

CHARLES FRANKLIN MURDOCH, JR.

Defendant and Appellant.

Appeal From The Superior Court Of
Los Angeles County
Honorable Charles D. Sheldon, Judge

APPELLANT'S OPENING BRIEF

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[AOB 125]

XI.

EVEN IF DINARDO'S LETTER WERE PRIVILEGED, APPELLANT'S 5TH & 6TH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO CONFRONT AND CROSS-EXAMINE THE CHIEF WITNESS AGAINST HIM WOULD TAKE PRECEDENCE OVER DINARDO'S ATTORNEY-CLIENT PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE.

A. The Governing Principles

In denying appellant's motion for production of the letter, the trial court stated that the attorney-client privilege was "inviolate." (RT 769.) The trial court was wrong. As this Court recognized in *Velu* v. *Superior Court* (1989) 208 Cal.App.3d 141, 151, while the attorney-client privilege is entitled to great deference, the privilege must nonetheless yield when it clashes with more compelling Sixth Amendment rights of a criminal defendant to confrontation and cross-examination.

The United States and California Supreme Courts, employing a Fifth Amendment Due Process analysis, have similarly concluded that when a statutory privilege and a criminal defendant's right to a fair trial conflict, the court must weigh the competing interests and strike the balance in favor of the more compelling need. If sustaining a personal privilege would thwart a criminal defendant's fundamental right to a fair trial, the privilege must yield. *(Kyles, supra,* 514 U.S. 419; *Pennsylvania* v. *Ritchie* [AOB 126] (1987) 480 U.S. 39; *Bagley, supra,* 473 U.S. 667; *Brady, supra,* 373 U.S. 83, *People* v. *Webb* (1993) 6 Cal.4th 494, 517-518.) Here, for a multitude of reasons, the balance must be struck in appellant's favor, as a matter of law.

The cases have focused their analyses on both the purpose of the Sixth Amendment guarantees, and the materiality of the excluded evidence. With

respect to purpose, the cases emphasize that the right to confront and cross examine witnesses serves more than merely symbolic goals. Its function is to promote reliability and advance the pursuit of truth in criminal trials. Denial or significant diminution of the right to cross-examine calls into question the ultimate integrity of the fact-finding process. Therefore, the right to obtain and utilize material evidence essential to effective cross-examination is broadly construed, and competing interests are subjected to the closest scrutiny. (*Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 51, *Lee* v *Illinois* (1986) 476 U.S. 530, *Nixon, supra, 418 U S.* at pp. 708-*709; Chambers* v. *Mississippi* (1973) 410 U.S. 284, 295; *Berger* v. *California* (1969) 393 U.S. 314, 315.) Because privileges, including the attorney-client privilege, act in derogation of the search for truth they are strictly construed, and are allowed only to the extent that they serve a public good which transcends the search for truth embodied in the Sixth Amendment guarantees. (*Nixon, supra,* 418 U.S at p. 710 and fn. 18.)

Evidence is material, for constitutional purposes, if there is a reasonable probability that had the evidence been disclosed [AOB 127] to the defense the result of the trial would have been different. To establish materiality, the defendant is not required to demonstrate by a preponderance of evidence that disclosure would have resulted in his acquittal--either based on reasonable doubt or on belief in his innocence. Nor does materiality depend on the sufficiency of the remaining evidence before the jury. Rather, the question is whether the character of the undisclosed favorable evidence was such that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (*Kyles, supra,* 514 U.S. at p. _ [131 Law Ed.2d at p. 506]; *Pennsylvania* v. *Ritchie, supra,* 480 U.S. at p. 57; *Bagley, supra,* 473 U S. at p. 682.)

Application of the necessary weighing process in accordance with these fundamental principles has produced the following results: In *Chambers* v *Mississippi, supra,* 410 U S. 284, 297—where a

witness had confessed to the crime three times and then repudiated the confessions the Court held that a defendant's rights to cross-examination and compulsory process took precedence over state evidentiary rules which prevented a party from impeaching his own witness and which treated declarations against penal interest as inadmissible hearsay. Even though the jury had been made aware of one of the three repudiated confessions, the Court held that this was insufficient to satisfy the constitutional guarantees to full and effective cross-examination and deprived the defendant of adequate opportunity to challenge the witness' renunciation of the written confession.

[AOB 128] In *Davis* v. *Alaska*, *supra*, 415 U.S. 308, the Court held that state confidentiality statutes designed to protect juveniles had to bow to the defendant's right to cross-examine a key witness about his juvenile record and his probation status. Similarly, in *Pennsylvania* v. *Ritchie*, *supra*, 480 U.S. 39, the Court held that the State would have to produce confidential information in its child protective services files, if the defendant could show that the files contained evidence which met the *Bagley* test of materiality.

Most significantly, in *Nixon*, *supra*, the Court held that a presidential claim of privilege had to yield to the greater need for relevant evidence in a criminal prosecution. The Court recognized that the president's claim of privilege with respect to confidential communications with his advisors was of constitutional dimension. (418 U.S. at p. 796.) It noted that the confidentiality of such communications not only carried the same value accorded to the privacy of ordinary citizens, but carried an enhanced value based upon protection of the public interest. As such the communications were entitled to the highest degree of respect from the courts. (418 U.S. at pp. 708, 714.) Nonetheless, the Court held that society's historic commitment to the rule of law required that a generalized claim of even presidential privilege must yield to the specific need

for relevant evidence in a criminal prosecution. (418 U.S. at pp. 708, 712-713.)

[AOB 129]

B. Given The Crucial Nature Of The Evidence, Appellant's Need To Discover The Letter Far Outweighed Dinardo's Desire To Maintain Confidentiality

Assuming, *arguendo*, that Dinardo's letter could be construed to fall within the attorney-client privilege, and that the privilege was not waived, any impartial examination of the materiality of the evidence, in light of the above principles, compels the conclusion that Dinardo's assertion of the privilege had to yield to appellant's greater need for access to the evidence that could have acquitted him. (*Kyles*, *supra*, 514 U.S. at p. ___ [131 Law Ed.2d at p. 506]; *Pennsylvania* v. *Ritchie*, *supra*, 480 U.S. at p. 57; *Bagley*, *supra*, 473 U.S. at p. 682.)

As noted above, and explained in the accompanying habeas corpus petition, the letter was directly exculpatory. It expressly contradicted the version of events which Dinardo told at trial--and at the time of his arrest--with respect to appellant's culpability. Therefore, unless barred by the privilege (Evid. Code, § 954), it was admissible, under California law, both to impeach Dinardo and as independent evidence of appellant's innocence. (Evid. Code, § 1235; *People* v. *Green*, *supra*, 3 Cal.3d at p. 985.) Its credibility was clearly a jury question.

Its materiality under the *Bagley* standard cannot seriously be disputed. If the jury had believed the letter was truthful, they would have had to acquit. Even if the jury had not been convinced [AOB 130] of the letter's truthfulness, it is reasonably probable that the letter would have sufficed to raise a reasonable doubt in the jurors' minds as to Dinardo's veracity and appellant's culpability. Thus, the character of the evidence was clearly such that it could reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict." (*Kyles, supra,* 514 U.S. at p. ___ [131 Law Ed 2d at p. 506].)

Dinardo's testimony formed the crux of the People's case. Exclusion of the letter presented Dinardo to the jury in a totally false light. Curtailment of cross-examination was particularly damaging because of the exceptional likelihood of bias created by the deal for leniency. (*DeSantis, supra,* 2 Cal 4th at p. 1220.) Denying appellant access to the letter made a sham of appellant's Fifth and Sixth Amendment rights and a mockery of the search for truth. (*Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39, 51, *Lee* v. *Illinois* (1986) 476 U.S. 530; *United States* v. *Nixon, supra,* 418 U.S at pp. 708-709; *Chambers* v. *Mississippi* (1973) 410 U.S. 284, *295; Berger* v. *California* (1969) 393 U.S 314, 315; *Napue* v *Illinois, supra,* 360 U.S. at p. 269.)

Dinardo could show no competing need to preserve the "privilege" which was comparable to appellant's need for access to the evidence. Dinardo had already been convicted; he could not be put in further jeopardy on the charges. Furthermore, he was about to extricate himself from the consequences of his conviction by testifying against appellant. His deal with the prosecution was not and could not constitutionally have been, contingent on the [AOB 131] People obtaining a conviction as a result of his testimony (*People* v. *Medina, supra,* 41 Cal App.3d at pp. 452-453; *People* v. *Green* (1951) 102 Cal.App 2d 831, 834-835.) The prosecutor was aware of the existence of the letter at the time she consummated the deal with Dinardo and, so far as appears on the record, the deal was not in any way contingent on the letter's being suppressed. The prosecutor asked only for a copy of the letter in the event that appellant obtained a copy. (RT 702.)

Dinardo's situation is diametrically opposed to that of the defendant in *People* v. *Godlewski.* (1993) 17 Cal.App.4th 940 (*"Godlewski"*) where Division 4 of this Court upheld a claim of attorney-client privilege against a due process challenge. Comparison of the facts in *Godlewski* demonstrates, by negative

example, why the privilege must yield in the present case.

Godlewski and a codefendant were tried jointly for murder. An issue was presented as to which one was the actual killer. Godlewski had made a statement to his own attorney in the jailhouse lockup which was overheard by another inmate.[65] The codefendant attempted to introduce the statement through the inmate's testimony. In sustaining the claim of attorney-client privilege, the Court cited the following factors: First, the intrinsic probative value of the proffered evidence was less than clear and substantial, because the statement did not constitute an [AOB 132] affirmative admission of guilt, but could reasonably be interpreted as just a discussion of trial strategy by Godlewski and his lawyer.[66] (17 Cal.App.4th at pp. 948, 950.) Here, by contrast, the Dinardo letter affirmatively exculpates appellant.[67]

Second, there were two other witnesses in *Godlewski* who testified to statements made to them that were substantially the same as the overheard statement to the attorney. Additionally, the codefendant testified in his own behalf and recounted a purported conversation with Godlewski in which the latter confessed that he committed the homicide accidentally. (17 Cal.App.4th at p. 950.) Here, apart

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[65] The statement was ruled privileged, despite being overheard, because the conditions in the jail prevented greater privacy through no fault of the client. (17 Cal.App.4th at p. 944, fn. 25.)

[66] Although the *Godlewski* Court sustained the attorney-client privilege, it disclosed the contents of the proffered statement in the opinion to illuminate the rationale for its decision. (17 Cal.App.4th at p. 944.)

[67] Additionally, appellant would also note that the excluded evidence in *Godlewski* was of limited probative value. It was multiple hearsay, dependent on the credibility of a jailhouse inmate, a notoriously suspect class of witness, and thus of limited reliability. Here the statement was in Dinardo's own handwriting, and delivered to his attorney, someone he would not be expected to deceive.

from Dinardo's letter, there was no evidence exculpating appellant, nor was there any directly inconsistent prior statement by which Dinardo could be impeached

Finally, the Court cited the fact that Godlewski and the codefendant were being tried jointly, and the key issue was which of them was the actual killer The Court strongly suggested that it might have reached a different result if the codefendant had [AOB 133] already pleaded guilty. (17 Cal.App.4th at p. 948.)[68] Here Dinardo had already been convicted on an aiding and abetting theory. There was nothing in the letter which suggested otherwise. The letter dealt only with the question of appellant's culpability.

The result of the requisite weighing process (*Vela* v. *Superior Court, supra,* 208 Cal.App.3d at p. 151) is that appellant's ability to defend against the charges effectively hinged on his obtaining access to the letter; whereas, the only "negative consequence" that Dinardo would have "suffered" by disclosure of the letter was that he would have been subjected to effective cross-examination. As is shown in the next section, that is not a consequence he had any legal right to avoid Dinardo was asserting a bare generalized claim which could not take precedence over appellant's specific, imperative need for the evidence to defend against the charges. (*Nixon, supra,* 418 U.S at pp. 712-713.)

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[68] In addition to being factually indistinguishable, *Godlewski's* legal underpinnings are somewhat suspect. The case does not discuss, or cite, *Brady, Bagley* or *Nixon,* and it antedates *Kyles.*

C. Dinardo's Assertion Of His Attorney-Client Privilege With Respect To The Letter Is Analogous To The Defendant's Unsuccessful Assertion Of His Miranda Rights In Harris v. New York And Should Be Resolved Similarly

[AOB 134]

An instructive analogy may be drawn between Dinardo's assertion of his attorney-client privilege with respect to the letter and the defendant's assertion of his *Miranda*[69] rights in *Harris* v *New York* (1971) 401 U.S. 222 *("Harris")*. In *Harris*, the prosecution acknowledged that a statement obtained from the defendant violated his *Miranda* rights. Consequently, the State made no attempt to introduce the statement during their case in chief However, when the defendant took the stand and testified in a manner inconsistent with the statement he gave police, the prosecution was allowed to impeach him with the earlier inconsistent statement.

Ruling that the evidence was properly admissible, the Supreme Court made the following observations which are equally relevant to Dinardo's situation While every criminal defendant has a constitutional right to testify in his own defense, or to refuse to do so, this privilege cannot be construed to include the right to commit perjury If he chooses to testify voluntarily, he must do so truthfully, and may be subjected to traditional techniques of impeachment, including use of prior inconsistent statements. The Miranda shield could not "be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (401 U.S at p. 225-226.)

The same considerations apply with equal force to Dinardo's situation. The letter--whether privileged or not--stands on no [AOB 135] higher plane than Harris' *unMirandized* statements. Dinardo's decision

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[69] *Miranda* v *Arizona* (1966) 384 U.S 436

to testify in accordance with his earlier statements to police, in exchange for the "deal," did not confer either on him or on the prosecution the right to present their version of the facts to the jury in the misleading light cast by suppression of Dinardo's prior inconsistent statement exculpating appellant.

Even if Dinardo's attorney-client privilege were accorded constitutional status, "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth"--or an out and out falsehood (*United States* v. *Nobles* (1975) 422 U.S. 225, 241.)

D. Suppression Of The Letter Was Prejudicial As A Matter Of Law

Kyles holds that once a reviewing court, applying the *Bagley* test of materiality, has found constitutional error in the exclusion of the evidence, there is no need for further harmless error review. *Kyles* finds this conclusion inescapable: *Bagley* error cannot be treated as harmless, because it is based on a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (514 U.S. at p _ [131 L.Ed.2d at p. 507].)

The Court also noted, however, that the "unscathed" evidence [AOB 136] in *Kyles*, by the State's own admission, hardly amounted to overwhelming proof of guilt. (514 U.S at p [131 L.Ed.2d at p. 516].) Such was obviously the case here as well. Both the trial court (DRT 775) and the prosecutor (SRT 1281) doubted that the jury would have convicted appellant without Dinardo's testimony. The letter was the only real piece of evidence which impeached Dinardo or exculpated appellant, and it did both.

Fuller's assertion, when he first resisted production, that he did not believe the contents of the letter to be truthful (RT 728), like his later comments

at the resentencing hearing that he thought Dinardo had testified truthfully at trial (SRT 1283), are entitled to no weight in assessing prejudice. As *Kyles* held, the criminal trial is the chosen forum for ascertaining the truth about criminal accusations, not "the prosecutor's private deliberations," or the self-serving statements of counsel for an adverse witness with a biased stake in the proceedings. (514 U.S at p. __ [131 L.Ed.2d at p. 509])

Disclosure of the letter would have resulted "in a markedly weaker case for the prosecution and a markedly stronger one for the defense." (Kyles, *supra,* 514 U.S. at p. [131 L.Ed.2d at p 510].) Hence, the importance of the letter cannot be overstated. Whether measured by the *Kyles-Bagley* standard or the reasonable doubt standard (*Chapman* v. *California, supra,* 386 U.S. at p. 24), suppression of the letter was overwhelmingly prejudicial.

SUPPLEMENTAL APPENDIX C

FILED
MAY 20 1997

CONSOLIDATION WITH PENDING APPEAL REQUESTED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION

IN re CHARLES FRANKLIN MURDOCH, JR

2d Crim. B1_____

Petitioner,

On Habeas Corpus

(Related Appeal Pending,
2d Crim B100877,
Division Three)

PETITION FOR WRIT OF HABEAS CORPUS
[WITH ATTACHED EXHIBITS]

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[HC Pet 21] VI.

ASSUMING, ARGUENDO, THAT THE LETTER WAS EVER PRIVILEGED, PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TAKE PRECEDENCE OVER DINARDO'S PRIVILEGE UNDER THE PARTICULAR FACTS OF THIS CASE.

As set forth at length in the Appellant's Opening Brief (AOB 125-132), a witness' attorney-client privilege must yield when it clashes with the defendant's more compelling rights to cross-examination and to fundamental due process. (*Kyles* v. *Whitley* (1995) 514 U.S. 419 [131 L. Ed.2d 490]; *Pennsylvania* v. *Ritchie* (1987) 480 U.S. 39; *Vela* v *Superior Court* (1989) 208 Cal.App.3d 141, 151.)

Here, the letter was crucial not only to impeach Dinardo, the crucial prosecution witness, but as affirmative proof of petitioner's innocence. There was no other exculpatory evidence available to petitioner to refute 12 year old charges. Hence suppression of the letter deprived petitioner of fundamental due process. (*Brady* v. *Maryland, supra,* 373 U.S. 83.)

Additionally, suppression of the letter effectively deprived petitioner of his Sixth Amendment right to cross-examine an especially biased witness, testifying under an unlawfully generous grant of leniency, about the key issue of guilt or innocence. (*People* v. *DeSantis* (1992) 2 Cal.4th 1198; *Vela* v *Superior court, supra,* 208 Cal.App.3d at p. 151.)

[HC Pet. 22]

Application of the balancing test enunciated by the Supreme Court in *Kyles* v. *Whitley, supra,* 514 U.S. 419 [131 L. Ed 2d 490] compells the conclusion that petitioner's need for the evidence outweighed Dinardo's need for confidentiality.

Moreover, Dinardo had no right to testify under a false cloak of credibility, shielded from his prior

inconsistent statements. (Cf. *Harris* v. *New York* (1971) 401 U.S. 222; AOB 133 135.)

For the reasons set forth herein and in the accompanying Appellant's Opening Brief (2d Crim. B100877), it was prejudicial error to suppress the letter.